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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. ~~5750~~ 70-5014

PETER STANLEY, SR.,

Appellant,

—v.—

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

BRIEF OF CENTER ON SOCIAL WELFARE POLICY AND LAW, *AMICUS CURIAE*

JONATHAN WEISS
E. JUDSON JENNINGS
TOBY GOLICK
Center on Social Welfare
Policy and Law
401 West 117th Street
New York, New York 10027.
Attorneys for Center on Social Welfare Policy and Law

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PETER STANLEY, SR.,

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—v.—

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

BRIEF OF CENTER ON SOCIAL WELFARE POLICY AND LAW, *AMICUS CURIAE*

Interest of *Amicus Curiae*

The Columbia Center on Social Welfare Policy and Law is funded by the Office of Economic Opportunity, and is associated with the Columbia University School of Law. The Center provides assistance in research and litigation for legal services and other attorneys serving the poor.

The Center has appeared before this Court in *Goldberg* v. *Kelly*, 397 U.S. 254 (1970); *Rosado* v. *Wyman*, 397 U.S. 397 (1970) and *Wyman* v. *James*, 397 U.S. 904 (1970), and has submitted briefs *amicus curiae* in *King* v. *Smith*, 392 U.S. 309 (1968); *Shapiro* v. *Thompson*, 394 U.S. 618 (1969); *Simmons* v. *Housing Authority of West Haven*, 399 U.S. 510 (1970); *Boddie* v. *Connecticut*, 395 U.S. 974 (1969);

Sanks v. *Georgia*, 395 U.S. 974 (1969); *Wheeler* v. *Montgomery*, 397 U.S. 280 (1970); *Dandridge* v. *Williams*, 397 U.S. 471 (1970), and *Labine* v. *Vincent* (O.T. 1970, No. 5257).

Approximately one-third of the poor are illegitimate and subject to the many social and legal disabilities attendant on this status. This case challenges the constitutionality of a state law which denies parental rights to the father of an illegitimate child, regardless of his fitness to act as a father. The Center has a continuing concern with questions such as are involved here, since the ruling in this case will have a substantial impact on large numbers of poor children and their families.

All parties have consented to the filing of this *amicus* brief.

Questions Presented

1. Does the denial to the natural father of the right to custody of his child, based only on his failure to marry the mother of his child before her death, violate equal protection and infringe upon constitutionally protected parental rights?

2. Does the irrebuttable presumption that a child with only a natural father surviving has no parent with any rights violate due process?

Statement of the Case

The case is stated adequately in the Petitioner's brief.

ARGUMENT

I.

Severance of family ties because the only remaining parent is a natural father violates equal protection.

To define precisely the classes present in this case is to demonstrate the utterly irrational classification the Illinois statute presents. First, there are two broad categories—parents who are married to the other parent and those who are not. These two categories are further subdivided into men and women. Illinois seizes one of the four sub-categories: men who are not married and are parents. It then imposes additional questions: (1) Is there a subsequent marriage with adoption or visitation? (2) Is there any adoption at all? If the answer to these questions is "no," the statute severs family ties and takes away the child from the parent. Such action based on such a classification defies logic.

"When the existence of a distinct class is demonstrated and it is further shown that the laws, as written or as applied, single out this class for different treatment, not based on some reasonable justification, the guarantees of the Constitution have been violated." *Hernandez* v. *Texas*, 347 U.S. 475, 478 (1954). The distinct class here is singled out and faced with the forbidden irrational treatment.

It should be noted that this denial of equal protection also extends to the illegitimate child. Illegitimate children are denied a father's love in cases where legitimate children would not suffer a similar deprivation despite the fact that the illegitimate child may have greater need for a paternal

relationship. See Foder, "Emotional Trauma Resulting From Illegitimate Birth," 54 Archives of Neurology and Psychiatry 381 (1945). This is particularly egregious when the father, as here, is without a doubt the father and has so acted for many years.[1]

There is no reason to belabor the point. Authorities for striking down irrational classifications are numerous and are cited in petitioner's brief. Any examination of the classification reveals its irrationality.

II.

The Illinois statute unconstitutionally violates parental rights.

The Illinois statute arbitrarily denies petitioner the basic right of a father to raise his children solely because he had not married the mother of his children in the 16 years they lived together and raised the children before her death. He is thereby denied the fundamental right to a family relationship with his children, a right which the Supreme Court has long recognized and guarded. See *Meyer* v. *Nebraska,* 262 U.S. 390, 399 (1922). As this Court noted in *Prince* v. *Massachusetts,* 321 U.S. 158, 166 (1944): "It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." See also *Pierce* v. *Society of Sisters,* 268 U.S. 510 (1925); *West Virginia Board of Education* v. *Barnette,* 319 U.S. 624 (1942); *Farmington*

[1] The classification might have some relevance to asking for simple presentation of proof of paternity but that is not present in this case. Also see *Glona* v. *American Guarantee,* 391 U.S. 72 at 76 (1968).

v. *Tokushige,* 273 U.S. 284 (1927); *Engel* v. *Vitale,* 370 U.S. 421 (1962); *People* v. *Ewer,* 141 N.Y. 129 (1894). These custodial rights are "far more precious . . . than property rights." *May* v. *Anderson,* 345 U.S. 528, 533 (1953).

The Constitutional right to a family relationship arises from a reading of the requirements of the Bill of Rights together with related principles. In this respect it is similar to the right to travel (see *Guest* v. *United States,* 383 U.S. 745 (1966); *Shapiro* v. *Thompson,* 394 U.S. 618 (1969)), and the right to privacy (see *Griswold* v. *Connecticut,* 381 U.S. 479 (1969); *Boyd* v. *United States,* 116 U.S. 616 (1886):

> "[T]here is a 'realm of family life which the state cannot enter' without substantial justification." *Griswold* v. *Connecticut, supra,* at 503. (White, *J.,* concurring.)

When the state's entry into the protected realm consists of permanent destruction of the family unit, its justification must be very substantial indeed. *Armstrong* v. *Manzo,* 380 U.S. 545 (1965), is a case almost directly on point. This Court recognized the father's rights even against the married mother seeking to cement her new family unit by adoption. This Court held that a full-fledged hearing with due process must precede such severance.

The state's action also violently interferes with the child's right and need to be with his actual parent.[2] "To

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[2] Kestenberg "Separation from Parents," J. NERVOUS CHILD, 20 (1943); Fodor, Emotional Trauma Resulting from Illegitimate Birth, 54 ARCHIVES OF NEUROLOGY AND PSYCHIATRY, 381 (1945); J. Bowlby, *Maternal Care and Mental Health* (1952); Kahn "Child Welfare; Trends and Directions," 41 Child Welfare 459 (1962).

the illegitimate child, the father is never putative." *Commonwealth* v. *Rozanski,* 206 Pa. Super. 397, 402, 213 A.2d 155, 151 (1965). This paramount factor has been recognized by an increasing number of courts who realize that the "best interests of the child" in many cases will lie with his natural father.[3] These children have just lost their mother. Illinois now wants to compound their tragedy by making them lose their father. The children are being punished for their status of illegitimacy. This Illinois cannot do. See *Glona* v. *American Guarantee,* 391 U.S. 73 (1968); *Levy* v. *Louisiana,* 391 U.S. 68 (1968). See Gray and Rudovsky, The Court Acknowledges the Illegitimate, 118 U. Pa. L. Rev. (1969); Comment, 67 Columbia L. Rev. 984 (1967); *Metropolitan Life Insurance* v. *Thompson,* 367 F.2d 791 (3rd Cir., 1966).

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[3] Many courts have held that the natural father has a right to custody of his child, *People* v. *Meredith,* 69 N.Y.S.2d 462, aff'd 297 N.Y. 692, 77 N.E.2d 8 (1947); *Wade* v. *State,* 39 Wash. 2744, 238 P.2d 914 (1951); *Hayes* v. *Strauss,* 155 Va. 136, 144 S.E. 432 (1928); *In re Guardianship of C.,* 237 A.2d 652, 98 N.J. Super. 474 (1967); *In re Moore's Estate,* 415 P.2d 653 (1966); *In re Brennan,* 134 N.W.2d 126 (Minn., 1965); *Godinez* v. *Russo,* 266 N.Y.S.2d 636, 49 M.S.2d 66 (1966). Cases where the past statutory practice was that the father's consent is not necessary before placing an illegitimate child for adoption (*e.g.,* N.Y. DOMESTIC RELATIONS LAW Section 111(3) now cf. Section 392 of N.Y. SOCIAL SERVICES Law) have been modified by many states when the mother dies after consenting. In a number of instances, courts have held that the natural father has the right to revoke the consent. *In re Adoption of a Minor,* 155 F.2d 870 (D.C. Cir., 1946); *In re Hopes Adoption,* 30 Wash.2d 185, 191 P.2d 289 (1948). A number of state legislatures have also recognized this right, *e.g.,* ARK. STAT. Section 56-106(c) (1947); IND. ANN. STAT. 3-120 (1946); N.D. CENT. CODE Section 14-11-10 (1959). Also, it is now generally accepted that the natural father of an illegitimate child has reasonable rights of visitation, *Commonwealth* v. *Rozanski,* 206 Pa. Super. 397, 213 A.2d 155 (1965). And recently, it has been held that a putative father may sue to establish his paternity. *Crane* v. *Battle,* 62 Misc.2d 139, 307 N.Y.S.2d 355 (Family Ct., 1970).

Statutory classifications must be justified by a rational relationship to a legitimate state purpose. See, *e.g.*, *Carrington* v. *Rash*, 380 U.S. 89. "While this Court has applied the test of rationality with some lenience in the area of economic legislation, see, *e.g.*, *Morey* v. *Doud*, 354 U.S. 457, the Court has been "extremely sensitive when it comes to basic civil rights." *Levy* v. *Louisiana, supra*, at 70.

In addition, the Supreme Court has long held that classifications involving race or ancestry are highly suspect and may only be used if there "clearly appears . . . some overriding statutory purpose." *McLaughlin* v. *Florida*, 379 U.S. 184, 192. See also *Oyama* v. *California*, 323 U.S. 623 (1948). Discriminations based on status of birth are closely analogous to those based on race or ancestry because they disadvantage members of a minority group subject to substantial private discrimination, *cf. United States* v. *Carolene Products Co.*, 304 U.S. 144, 152-53, n. 4 (1938), and because, at least for the child, they are beyond the control of the individual. *Levy* v. *Louisiana, supra; King* v. *Smith*, 392 U.S. 309 (1968).

This Court recently applied the requirement of rationality to strike down discriminations against both illegitimate children and their mothers in *Levy* v. *Louisiana, supra*, and *Glona* v. *American Guarantee & Liability Ins. Co., supra*.[4] There is no more justification for the discrimi-

[4] While the *Levy* and *Glona* decisions dealt with the maternal relationship, a number of subsequent cases have applied the underlying principle to the relationship between illegitimate children and their fathers. See *Schmoll* v. *Creecy*, 54 N.J. 194, 254 A.2d 525 (1969); *Jones* v. *Welfare Board*, No. 4-68 Civ. 248 (D. Minn., temporary restraining order filed July 30, 1968); *Munn* v. *Munn*, —— Colo. ——, 450 P.2d 68 (1969); *R* v. *R*, 431 S.W.2d 152 (Mo. 1968); *Haley* v. *Metropolitan Life Ins. Co.*, 434 S.W.2d 7 (St. Louis Court of Apps. 1969); *In re Estate of Jensen*, 162 N.W.2d 861 (N.D. 1968).

nation practiced here, in which basic family rights are denied the father and children, based on the father's sex and his marital status. In *Glona, supra,* this Court specifically rejected the claim that discrimination against illegitimate mothers would deter the "sin" which leads to illegitimacy. 391 U.S. at 75. See, in general, *King* v. *Smith, supra.* A legislative intent to deter would even be less reasonable here.

The Illinois statute cannot be justified as a device to encourage marriage and the legitimization of children, since there is no way to marry a dead person. No more rational is the suggestion by Illinois that denying the natural father custody rights is permissible as a means of encouraging the natural father to adopt the child.[5] To deny the natural father custody of a child in order to encourage him to go through difficult procedures to get custody is Constitutionally impermissible. First, it deprives the parent of the child without a prior hearing. See *Goldberg* v. *Kelly,* 397 U.S. 254 (1970); *Sniadach* v. *Family Finance,* 395 U.S. 337 (1969). Second, it shifts the burden of proof to the father to prove fitness rather than requiring the state to prove unfitness as the justification for severing family ties. *Armstrong* v. *Manzo, supra. Garfield* v. *Goldsby,* 211 U.S. 249 (1908) held that you could not make a man shoulder the burden of going to Court to get his citizenship. Putting the burden of proving fitness on the father is equally impermissible. Such a process particularly penalizes the poor. *Cf. Boddie* v. *Connecticut,* —— U.S. —— (1971); *Harper* v. *Board,* 383 U.S. 663 (1966); *Yick Wo* v. *Hopkins,* 118 U.S. 356 (1886). Even if the

[5] Nor is adoption proceeding a way to find proof of paternity. It merely measures interest of a sort, at best.

parent knew of the availability of adoption he would need counsel and counsel is not automatically provided when courts sever parental ties. See *Gideon* v. *Wainwright,* 372 U.S. 335; *Reynolds* v. *Cochran,* 365 U.S. 525 (1961), at 532-3. While encouraging adoption may be a legitimate government purpose, that purpose cannot be pursued by means that broadly infringe upon basic rights, when there are available less drastic means for achieving the same ends. *Shelton* v. *Tucker,* 364 U.S. 479 (1960).

III.

The Illinois statutes automatic presumption that a child with a natural father has no parent is irrational and illegal.

The effect of the Illinois statutory sections read together is to create an irrebuttable presumption which is irrational: From the fact that the father of the child did not marry the mother before the mother's death, it is conclusively presumed that the child is dependent "without a parent, guardian, or legal custodian," and that a Court must put the child in the care and custody of a person whom it deems "a fit" custodian. This application of an invalid presumption constitutes a denial of due process.

An irrational presumption cannot meet due process requirements. *Tot* v. *U. S.,* 319 U.S. 463 (1943); *Western & A. R. Co.* v. *Henderson,* 279 U.S. 639 (1929); *Alton* v. *Alton,* 207 F.2d 667 (3rd Cir. 1953); *Leary* v. *U. S.,* 395 U.S. 6 (1969). This requirement applies to civil cases. *Speiser* v. *Randall,* 357 U.S. 513 (1958); *Solmon* v. *Shapiro,* 300 F. Supp. 409 (D.C. Conn. 1969), aff'd, 396 U.S. 5 (1969); *Slochower* v. *Board of Education,* 350 U.S. 551 (1955); *Smith* v. *King, supra.*

In a case involving the conclusive presumption of support contributions from a non-adopting step-father, a Federal District Court held:

> ". . . I consider that (the presumption) violates plaintiffs' rights under the Due Process clause of the Fourteenth Amendment. The mere fact that there is a step-father living with the family causes Defendant to terminate benefits to children otherwise eligible. There is no consideration of the needs of the child nor is there a determination of the actual availability of the income . . .". *Ojeda et al.* v. *Hackney,* Civ. 7-515 (U.S.D.C. ND Texas, Sept. 4, 1970, —— F. Supp. ——.

In the case at bar, petitioner cared for and raised his child for all but a brief period. He lived with the child's mother many years. It is now impossible to marry the mother. Yet the Illinois statute forbids a Court to evaluate any of these factors. From the failure to marry is inferred the dependency, *i.e.,* is inferred the unfitness of the father. And the effect is to deprive the child of its natural father. "Why should the illegitimate child be denied rights merely because of his birth out of wedlock?" *Levy* v. *Louisiana,* 391 U.S. 68 (1968), at 71.

Nor does the public policy of encouraging parents to marry or to discourage illicit sexual practices in any way justify this irrational presumption. This Court has explicitly rejected the notion that ". . . since the legislature is dealing with 'sin', it can deal with it selectively and is not compelled to adopt comprehensive or even consistent measures." *McLaughlin* v. *Florida,* 379 U.S. 184, 191.

Like the presumption of fraud in conveyances to a parent, the presumption of a father's unfitness assumes "a

principle at war with all filial as well as parental duty and affection." *Jenkins* v. *Pye,* 37 U.S. 240, 253 (1838). "Whereas the presumption ought to be, in the absence of all proof tending to a contrary conclusion, that the advancement of the interest of the child was the object in view." *Id.*

Armstrong v. *Manzo, supra,* held that you could not presume a man did not care for his children and have them adopted away—here the state presumes the man cannot care for the children and severs the relationship without a hearing. The presumption against parents such as the appellant in this case is unconstitutional.

CONCLUSION

For the reasons stated above, the decision of the court below should be reversed.

Respectfully submitted,

JONATHAN WEISS
E. JUDSON JENNINGS
TOBY GOLICK
Center on Social Welfare
Policy and Law
401 West 117th Street
New York, New York 10027

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PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

BRIEF FOR THE PETITIONER

LEWIS A. WENZELL
PATRICK T. MURPHY
CLARA ANN BOWLER

Legal Air Bureau
1114 South Oakley Blvd.
Chicago, Illinois 60612

Attorneys for Petitioner

Washington, D. C. THIEL PRESS 202 393-0625

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. 5750

PETER STANLEY, SR.,

Petitioner,

v.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

BRIEF FOR THE PETITIONER

OPINION BELOW

The opinion of the Supreme Court of Illinois is reported officially and unofficially, respectively in 45 Ill. 2d 132 and 256 N.E. 2d 814. A copy of the opinion appears in the Appendix. (A. 31-33) The trial court, Circuit Court of Cook County (Chicago, Illinois), Juvenile Division, rendered no opinion.

JURISDICTION

The judgment of the Supreme Court of Illinois was entered on 24 March 1970 which affirmed the Circuit Court of Cook County, Juvenile Division's ruling of 6 May 1969 in which the Petitioner's two children, Peter, Jr. and Kimberly Stanley, were adjudicated dependent children. A rehearing of the Illinois Supreme Court decision was not sought. The only issue raised by Mr. Stanley in the Illinois Supreme Court was whether the Illinois statutory scheme which denied to him, an unwed father, any rights to his children, denied him the equal protection of the laws guaranteed by the Fourteenth Amendment of the United States Constitution. Although the equal protection argument was first specifically articulated on appeal to the Supreme Court of Illinois, this federal question was timely and properly raised so as to give the Supreme Court of Illinois and this Court jurisdiction to review the judgment since the Illinois rule is that "any error of law affecting the judgment or order appealed from, may be brought up for review in any civil case," Illinois Supreme Court Rule 366(b)(1) (Ill. Rev. Stat., Ch. 110 A, Sec. 366 (b)(1) (1969). Also see, Ill. Rev. Stat., Ch. 110, Sec. 64(3) (1969) and Ill. Rev. Stat., Ch. 110 A, Sec. 366(b)(3)(1) (1969). Furthermore, neither party nor the Supreme Court of Illinois, at argument or in its opinion, suggested that the federal question was not timely and properly raised and the Supreme Court of Illinois's affirmance of the judgment of the Circuit Court rests specifically upon a negative answer, in the first three paragraphs of its decision, to the question which Stanley seeks to have reviewed by this Court. Therefore, jurisdiction properly rests with this Court. *Boykin v. Alabama*, 395 U.S. 238, 241-242 (1969).

The jurisdiction to review the final judgment and decree of the Illinois Supreme Court is conferred upon this Court by Title 28, United States Code, Sec. 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment, XIV, Section 1:

"No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Juvenile Court Act, Sec. 2-5(1)(a):*

"*Dependent Minor.*) (1) Those who are dependent include any minor under 18 years of age (a) who is without a parent, guardian or legal custodian; . . ."

Juvenile Court Act, Sec. 1-14:

"*Parents.*) 'Parents' means the father and mother of a legitimate child, or the survivor of them, or the natural mother of an illegitimate child, and includes any adoptive parent. It does not include a parent whose rights in respect of the minor have been terminated in any manner provided by law."

QUESTION PRESENTED

Whether an Illinois statutory scheme which discriminates against the surviving unwed natural male parent of properly maintained, illegitimate children by providing that such surviving unwed male parent shall be excluded from the statutory definition of "parents" and, hence, have no rights to his children denies surviving unwed natural fathers the equal protection of the laws where this discriminatory treatment has no rational or reasonable basis?

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*Each section of the Juvenile Court Act cited in this Brief is reprinted in full in Appendix I of this brief.

STATEMENT

On 6 May 1969 Peter Stanley, Jr. and Kimberly Stanley, ages 2½ years and 6 months at that time, were adjudicated dependent children and made wards of the Circuit Court of Cook County (Illinois), Juvenile Division (hereafter juvenile court). The actual trial takes up less than eight pages of the transcript. (A. 18-23)

The only witness to testify for the State was a court employed probation officer, Lucille Glenn. She testified that she had sought marriage verification at the Bureau of Vital Statistics for the years 1949 through 1951 and was unable to find any proof that Peter and Joan Stanley had been married. (A. 19-20) On cross examination Mrs. Glenn stated that Karen Stanley (a daughter of Peter Stanley, 17 years old at the time) had told her that Peter Stanley had not always lived continuously with Joan Stanley but that he had been living continuously with Joan Stanley from the time Kimberly and Peter Jr., were born. (A. 21) Peter Stanley later testified subject to cross examination that he had been living with Joan Stanley for 18 years. (A. 22)

Peter Stanley testified without contradiction that he was the father of Peter, Jr. and Kimberly Stanley. He further testified he had been living with Joan Stanley for 18 years at the time of her death and continued to live with his children after her death. He stated that about two months prior to the trial he had arranged for friends, Mr. & Mrs. Ness, whom he had known for ten or twelve years, to care for the children. (A. 22) Mrs. Glenn told the juvenile court that the children were receiving good care at the Ness home (A. 10), that there was a lot of emotional love in the home, (A. 18) and that the Ness' should be appointed guardians. (A. 18)

The Assistant State's Attorney, Mr. DiNatale, stated that he would stipulate to Peter Stanley's testimony although he thought Stanley had not been under oath. Mr. DiNatale pointed out that common law relationships had been aban-

doned in Illinois and in Indiana (A. 23). A finding of dependency followed and Mr. & Mrs. Ness were appointed guardians of the children. (A. 23)

There was discussion both before and after the trial about the circumstances that would allow Stanley to have his children returned to him. The court stated before the trial that Stanley could file a petition, presumably to vacate a judgment of dependency. However, the court added that Stanley had no legal parental right to do so and his legal position would be the same in six months as it was at that time. (A. 16-17) After the trial the court said that Peter Stanley was not foreclosed from filing a petition at any subsequent time to establish some parental or guardianship rights over the children and that the court would consider this petition at that time. (A. 23)

Prior to the trial the probation officer told the court that if there were a finding of dependency, the children would quite obviously have no legal parent. She went on to state that Stanley was not in a position financially to provide properly for the children but in the future, if he developed a proper plan "we would have to consider it at that time. I cannot say." (A. 17)

Assistant State's Attorney DiNatale stated:

> "We are not alleging that any neglect really, Your Honor, but there is a situation where we have a natural father and there is the mother, is sole and only legal parent deceased;
>
> "The children are dependent under the Statute. If the father comes in at a later date I mean the natural father, although not the legal, and I have this situation, and the Probation Department checks it out, and in that case it would be up to the Court to determine at that time whether or not the children should be returned to the father." (A. 17)

After the trial DiNatale stated that Stanley had no rights but only liabilities, but that the State had attempted to grant him rights by giving him a choice of guardian. He

also said that if Stanley made some progress and "was to marry and establish an orderly family situation that in all probability if he petitioned the court, he would have the children back." (A. 29-30)

SUMMARY OF ARGUMENT

The Illinois Juvenile Court Act confers the status of parent upon all natural mothers, wed or unwed, all natural fathers who are wed and all adoptive parents. The State of Illinois grants to these parents great freedom to raise their children and will remove children from the custody and control of their parents in only a limited number of circumstances. The most common form of governmental interference in the child rearing process which can result in removal of the child from the parent's custody and control is a Neglected Minor proceeding under the Juvenile Court Act. Before a child may be taken from its parent through such a proceeding, the State must prove not only that the child has been neglected but it must be shown that the parent is unfit or unable, for other than financial reasons, to care for the child.

Illinois does not confer the status of parent upon any unwed natural father. Even those unwed fathers who voluntarily acknowledge, support, establish a familial relationship with and neither neglect nor abuse their children are not parents, but are considered legal strangers to their children. Interestingly, as long as the child's mother is alive and wishes the natural father to be the father, the State of Illinois will not interfere with his exercise of custody and control over the children except upon the same terms that it would interfere with the custody and control of those persons the State labels parents. Once, however, the mother dies or leaves the children alone with the unwed father, the unwed father's legal status as a stranger to his children becomes operative. In order for him to again obtain the custody and control of the children he has willingly recognized as his own the unwed father must not

merely demonstrate he has acknowledged, supported, established a familial relationship with and not neglected his children but must show he is a suitable person to be a parent. Unfortunately, the latter term or concept is no where defined and the mere fact an unwed father has been a suitable parent prior to his common-law wife's death is without significance.

The State has sought to justify this treatment of the unwed father on several grounds related to the State's general interest of promoting the best interests of children. It is said that the discriminatory treatment of unwed fathers encourages adoption which benefits illegitimate children by allowing then to take intestate estates of their natural fathers and also, allegedly, removes the stigma of illegitimacy. This assertion is, however, unfounded for the State makes it so difficult for an unwed father, especially one who is indigent and remains single, to adopt his children that no unwed father who truly loves and cares for his children would file an adoption proceeding and, thereby, increase the risk his children would be taken from him. Moreover, it is inconceivable that had Illinois truly wished to achieve the goal of giving more illegitimate children intestate estates or removing from them the stigma of illegitimacy it would have chosen such a tenuous, circuitous and irrational way of so doing.

The State also asserts that the classification of unwed fathers as non-parents is justified by the State's wish to locate for parenthood only "suitable" unwed fathers. Another purpose of the classification, found in the legislative history resulting in the classification, is that it increases the administrative efficiency of adoption proceedings. However, neither of these purposes is sufficient to save the classification from unconstitutionality.

This Court has recognized that the relationship created by the presence of biological and familial lines is an important one. Moreover, this Court has held that the right to procreate is a fundamental interest. Certainly, one who has

exercised the right to procreate and has gone on to establish a familial relationship with his biological progeny has a fundamental interest in maintaining that relationship. The State's interest in promoting the administrative convenience of adoption proceedings is not sufficiently compelling to allow interference with this fundamental interest. Moreover, there are less drastic means to locate suitable unwed fathers than the blanket categorization of all unwed fathers as unsuitable to be their children's parents.

Moreover, it cannot be reasonably conceived that the purpose of the classification of unwed fathers as non-parents was meant to serve the purpose of ferreting out suitable unwed fathers. For the statutory scheme operates, as it did here, to deprive unwed fathers of parental control of their children upon a record which the State has characterized, albeit inaccurately, as devoid of information as to the unwed father's suitability for parenthood. Furthermore, the purpose of ferreting out suitable unwed fathers does not promote the interests of children. Severing children from parental images normally is harmful to the child and this is true even where the parent is mediocre. It is also, unfortunately, the case that the State is not in a position to act as a humane *parens patriae* and it cannot be presumed the State is able to provide more suitable parents than unwed fathers who have acknowledged, supported, established a familial relationship with and not neglected their children. Since the statutory classification generally has the harmful effect of separating children from non-neglectful fathers and the State is in no position to find more suitable parents, it is apparent that the classification rather than promote, actually disserves the welfare of minor children.

Prior to 1949, Illinois law allowed the unwed father a right to custody and control of his illegitimate children superior even to that of the mother. However, in 1949, the Illinois General Assembly cut off the unwed fathers rights in order to promote the efficient operation of adoption proceedings. The present classification is merely a codifi-

cation of the prior legislative action. If, however, the statutory classification is to have the effect of encouraging adoption it will only serve to clog the adoption courts with unnecessary cases. More importantly, the statutory classification's purpose of promoting the administrative convenience of adoption proceedings is simply irrelevant to the class of unwed fathers affected by the statute. The classification effects only unwed fathers who have a desire to exert custody and control over their children whereas adoption proceedings are and should be concerned only with children who are not wanted and have no family.

Because the statutory classification of fathers as non-parents has no rational relationship to any reasonably conceived purpose, it is violative of the Equal Protection Clause and its application to Peter Stanley to deprive him of the children he had voluntarily acknowledged, supported, established a familial relationship with and not neglected must be reversed.

ARGUMENT

THE FAILURE OF THE ILLINOIS JUVENILE COURT ACT TO CONSIDER PETER STANLEY, AN UNWED FATHER OF TWO ILLEGITIMATE CHILDREN WHOM HE HAD VOLUNTARILY ACKNOWLEDGED, SUPPORTED AND ESTABLISHED A FAMILIAL RELATIONSHIP WITH AND NEITHER NEGLECTED NOR ABUSED AND WHOSE MOTHER HAD DIED, AS A PARENT DENIED HIM EQUAL PROTECTION OF THE LAWS.

Introduction.

While Joan Stanley, the common-law wife of the Petitioner, Peter Stanley, was alive, wished Peter Stanley to be, and acted as if he was, the father of his children, the State of Illinois could not interfere with or intrude upon Peter Stanley's rearing of his children except under the circumstances the State might interfere with the child rearing of

the parent of a legitimate child.[1] State interference in the child rearing process which can directly result in terminating the familial relationship most commonly takes the form of a Neglected Minor proceeding pursuant to the Juvenile Court Act, § 2-4.[2] In such a proceeding the State would

[1]There is no way the State of Illinois could have forced Peter Stanley to leave his and Joan Stanley's home for the State only punishes adultery and fornication if it is "open and notorious," Ill. Rev. Stat., Ch. 38, § 11-7, § 11-8 (1969). Moreover, the ". . . notoriety must extend not only to the sexual intercourse and cohabitation, but must extend to the fact of the absence of the marital relationship between parties engaging in such behavior." Committee Comments to § 11-7, Smith Hurd Ill. Anno. Stats., Ch. 38, § 11-7, p. 631 (1964). Since Peter and Joan Stanley obviously lived together as in a state of marriage, the State of Illinois had no interest in the mere fact the cohabitation was without the marriage ceremony.

[2]We deal in this case with governmental intrusion upon parental control which can result in removing the child from the custody and control of the parent. Thus, such intrusions as curfew or compulsory attendance laws are not of relevance here. Nor are volitional acts of the child, e.g. commission of crime and subsequent imprisonment, which remove the child from the parent's control relevant. For the classification in question focuses solely upon *the natural parent's own* acts or omissions directly related to his or her suitability or fitness to assume parenthood. A parent's custody and control of his children could also be disturbed pursuant to the provisions of the Illinois Adoption Act, Ill. Rev. Stat., Ch. 4, §§ 9.1-1–9.1-24 (1969). However, unless the mother consented to the adoption there could be no adoption unless the mother were found to be an unfit parent, Ill. Rev. Stat., Ch. 4, § 9.1-8 and 9.1-1. D (1969). A finding of parental unfitness under the Adoption Act requires a higher burden of proof than necessary for a finding of neglect under the Juvenile Court Act for, "In adoption proceedings clear and convincing proof of the unfitness of a natural parent must be supported by the evidence." *Thorpe v. Thorpe*, 48 Ill. App. 2d 455, 198 N.E. 2d 743, 746 (4th Dist., 1964). A criminal proceeding for contributing to the dependency or neglect of children, Ill. Rev. Stat., Ch. 23, § 2361 (1969), or for cruelty to the children, Ill. Rev. Stat., Ch. 23, § 2368 (1969), would, of course, require an even higher standard of proof.

Citations to the Juvenile Court Act will be to the session law section number. The sections are reprinted and cited in full in Appendix I. Citations are to the 1969 codification as there are no differ-

have the burden of proving by a preponderance of the evidence that the children were neglected, § 4-6. The minor could not be removed from the custody of the parent unless there was a showing that the parent was unfit or unable to care for the child for some reason other than financial circumstances alone, § 5-7 (1). Such procedural protections as notice of the nature of the alleged neglect, representation by counsel and the necessity of proof by competent evidence would all be afforded the allegedly erring parent, §§ 1-20, 4-1 (2), 4-6. Moreover, even were the familial relationship terminated by removing the minor from the custody of the parent, the erring parent would retain residual parental rights, including the right to reasonable visitation and the right to determine the minor's religious affiliation, §§ 1-16, 1-11, 1-12, 5-9. Since there was no suggestion here that Peter Stanley's two children, Kimberly and Peter, Jr., had been neglected, there was no way, while Joan Stanley was alive, that Peter Stanley's relationship with his children could have been disturbed by the State.[3] However, when his common-law wife died, Illinois

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ences between the 1967 and 1969 codification of the sections involved in this case.

[3]The State's indication there was no neglect of the minor children, Kimberly and Peter Stanley, Jr., is partieularly significant here. The same judge that presided in the instant case also presided in the case of Karen Stanley, the 17-year-old daughter of the Petitioner, who had been adjudicated neglected. Moreover, the same prosecuting attorney, Mr. DiNatale, represented the State in both proceedings. However, in the proceeding involving Karen Stanley, the same counsel that represented and represents the Petitioner in this cause represented Karen and, in fact, assumed the task of presenting Karen's case. Unfortunately, the Petitioner was not represented by counsel at Karen's proceedings. Interestingly, it was the Probation Officer assigned in the case of Karen Stanley that filed the original unfounded neglect petitions in this case and who, although approving of the Petitioner's temporary placement of his children with the Ness family, did not care for Mr. Stanley's "state of mind" respecting the care of his children and did not believe he was in "a position financially to provide properly for the children."

law operated to convert Peter Stanley from a father who had acknowledged, supported, established a familial relationship with and not neglected his children into a stranger to his children, and in light of his indigence, a disadvantaged stranger.

The statutory scheme employed by the State of Illinois to deny Peter Stanley the fatherhood of his children is simple in its operation. Section 2-5 (1) (a) of the Juvenile Court Act provides that ". . . any minor under 18 years of age . . . who is without a parent . . ." is a Dependent Minor. Section 1-14 of the Act excludes an unwed father from its definition of parents–"'Parents' means the father and mother of a legitimate child, or the survivor of them, or the natural mother of an illegitimate child, and includes any adoptive parents. . . ." Thus, the moment Joan Stanley died, Peter Stanley's children became Dependent Minors and, upon the filing of an appropriate petition in the juvenile court, they were so adjudged and made wards of the Circuit Court of Cook County, Juvenile Division.[4] Since Peter Stanley did not claim a marriage outside the State of Illinois, all that was necessary for there to be an adjudication of dependency and wardship was a demonstration no

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[4] An adjudication of wardship of the Juvenile Court is not always automatic even though a child is found to be delinquent, otherwise in need of supervision, neglected or dependent. "Adjudicatory Hearing," § 1-4, under the Juvenile Court Act involves a two step process –(a) a finding as to jurisdictional facts, § 2-1, i.e. whether a minor is delinquent otherwise in need of supervision, neglected, or dependent and (b) a finding as to whether it is in the best interest of the minor and the public that he should be adjudged a ward of the Court, § 4-8. However, since the operation of the Juvenile Court Act rendered the Petitioner's children without a legal parent, guardian, or custodian upon the death of their mother, obviously the best interest of the child and the public mandated that the Juvenile Court assume wardship of the minors so that a legal custodian or guardian could be appointed. Thus, it was the operation of the Act rendering the minors without a legal parent, guardian or custodian that mandated that the Juvenile Court fill the void and adjudge the minors wards of the Court.

marriage certificate was on file in the Cook County Clerk's Office. Ill. Rev. Stat., Ch. 89, §§ 6, 12 (1969).

The Juvenile Court Act provides that after the children are made wards of the court, a Dispositional Hearing, § 1-10, is held to determine who should have the custody and/or guardianship of the children, §§ 5-1, 5-7. Section 5-7 of the Act provides that a minor may be taken from the custody of his parents if the court finds the legal parents ". . . are unfit or are unable, for some reason other than financial circumstances alone, to care for, protect, train or discipline the minor. . . ." The court may appoint, among others, any ". . . suitable relative or other person . . ." as guardian or custodian, § 5-7 (a). Thus, although Peter Stanley apparently might have been appointed custodian or guardian, he, not being a "parent", did not benefit by the legislature's recognition that financial circumstances alone are an insufficient reason for depriving a parent of the custody, control and society of his children. After the initial disposition, jurisdiction over the minor and the cause is retained by the juvenile court and the court may, after notice to the custodian or guardian, appoint a different custodian or guardian, §§ 5-2 (c) (3), 5-8. The State's argument (Brief For Appellee In Illinois Supreme Court, p. 15) and the opinion below—relying upon the juvenile court's continuing power to change guardians or custodians and upon the fact that the court can appoint any suitable person as guardian or custodian—suggest that the Petitioner might be, or have been, appointed custodian or guardian of his children. At the time of the proceeding below, however, there was neither a theoretical nor practical possibility Peter Stanley could have obtained appointment as custodian or guardian of his children.

At the time of the proceedings below holdings of the Illinois Supreme and Appellate Courts prescribed that the unwed father could obtain custody of his children only by adoption. Section 62 of the Illinois Paternity Act, *Ill. Rev. Stat.*, Ch. 106 3/4, § 62 (1969), provides and provided that

". . . a person charged or alleged to be the father of a child born out of wedlock, whether or not adjudicated the father under this Act, shall have no right to the custody or control of the child except such custody as may be granted pursuant to an adoption proceeding initiated by him for that purpose." Moreover, in *DePhillips v. DePhillips*, 35 Ill. 2d 154, 219 N.E. 2d 465 (1966) the Illinois Supreme Court in reversing a trial court's grant of visitation privileges to an unwed father held that ". . . a putative father should have no right to the society of his illegitimate child." (*Id.* at 158, 219 N.E. 2d at 467). See also, *Wallace v. Wallace*, 60 Ill. App. 2d 300, 210 N.E. 2d 4 (1st Dist. 1965); *Vanderlaan v. Vanderlaan*, 126 Ill. App. 2d 416, 262 N.E. 2d 717 (1st Dist. 1970). We must assume here, however, the opinion below has *sub silentio* overruled *DePhillips* and limited the effect of § 62 of the Paternity Act and presume that there is and was a theoretical possibility Peter Stanley could be or have been appointed custodian or guardian of his children by the juvenile court. However, admitting a theoretical possibility that the Petitioner could obtain custody or guardianship of his children under the Juvenile Court Act is but the beginning of the inquiry.

Despite this newly created theoretical possibility of Peter Stanley being appointed custodian or guardian under the provisions of the Juvenile Court Act, such appointment was a practical impossibility. The trial court's, prosecutor's and probation officer's comments in the proceedings below indicated only a potential future possibility of such appointment. (A. 15, 16, 17, 18, 22, 29-30). Moreover, Peter Stanley is disadvantaged by his meager financial circumstances even though the Juvenile Court Act specifically refuses to recognize this as a relevant consideration for other "parents", § 5-7. Financial circumstances were emphasized by the probation officer, ". . . I would say that Mr. Stanley is not in a position financially to provide properly for the children," (A. 17). Peter Stanley is further disadvantaged by the fact that he is single and saddled with the opprobrium which attaches to fathers of illegitimate child-

ren. As was noted by the prosecutor in the trial court, ". . . if he (Stanley) did have some progress and was to marry and establish an orderly family situation that in all probability if he petitioned the court, he would have the children back." (A. 29-30). Finally, the Petitioner is disadvantaged in his attempt to obtain custody or guardianship by the fact that Section 5-8 of the Act authorizing a change of guardian or custodian provides no standards to guide the court in making this decision and the implied standard of what is in the best interest of the child allows the trial court broad discretion in awarding custody or guardianship and this discretion is rarely disturbed upon review.[5] However, even if it is conceded that there was a practical possibility the juvenile court would appoint Peter Stanley guardian or custodian of his children, such a concession does not change the posture of this case for the rights accorded a court appointed guardian or custodian are simply not similar to those of a parent.

As a court appointed guardian or custodian, Peter Stanley would be under the constant supervision of the juvenile court and would be, whenever requested, required to make reports concerning his doings with respect to the children, § 5-8. Furthermore, he could be removed as guardian or custodian whenever the trial court wished to do so, § 5-8. He would, of course, not be free to move his children outside the court's jurisdiction without prior approval. The State recognizes, explicitly and implicitly, the distinct difference between being a parent and a custodian or guardian.

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[5]We have been able to find few Illinois cases in which neither party seeking custody of a child falls into the category of a "legal parent." In those cases where neither party seeking custody is a "parent," the appellate courts have always affirmed the decision of the trial court. *In re Richards*, 328 Ill. App. 591, 66 N.E. 2d 512 (1st Dist., 1946); *Winslow v. Lewis*, 15 Ill. App. 2d 65, 144 N.E. 2d 782 (2nd Dist., 1957); *Petition of Kollman*, 10 Ill. App. 2d 336, 134 N.E. 2d 629 (1st Dist., 1956); *People ex rel. Noonan v. Wingate*, 376 Ill. 244, 33 N.E. 2d 467 (1941).

Explicit recognition of the distinction between a parent and a custodian or guardian is apparent from the Juvenile Court Act itself which provides that even upon the appointment of a guardian or custodian, there remain residual parental rights, such as the right to visitation and to determine religious affiliation, § 1-16. The State implicitly recognizes there is a difference between being a parent and a guardian or custodian when it argues (Brief For Appellee In Supreme Court of Illinois, pp. 16-17) that the classification of parents which excludes unwed fathers encourages adoption. The adoptive parent is defined as a parent under the Juvenile Court Act, § 1-14. However, if an unwed father could obtain the benefits of being classed as a parent simply by being appointed guardian or custodian, there would be no reason for him to incur the added expense and effort of an adoption proceeding. If, having been appointed custodian or guardian, there is no reason to seek adoption, then it is impossible to argue the statutory classification in question encourages adoption. The State, in arguing that the classification does, in fact, encourage adoption, thus, recognizes that there is a difference between being a parent and a mere guardian or custodian.

The simple but fundamental difference between being a parent and being a mere custodian or guardian is that a parent has the right to raise his children free from governmental intrusion save in a limited number of circumstances. This Court has recognized the importance to and right of a parent to raise his children free from unwarranted government influence: "The child is not the mere creature of the state; those who nuture him and direct his destiny have *the right*, coupled with the high duty, to recognize and prepare him for additional obligations." *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925) (Emphasis added); *Meyer v. Nebraska*, 262 U.S. 390 (1923). A court appointed guardian or custodian is not only not free from governmental intrusion upon the rearing of the minor, but, indeed, holds his position by virtue of that intrusion. The only way

Peter Stanley could regain the freedom from governmental intrusion in his familial relationship with his children which he enjoyed prior to Joan Stanley's death, and which all other natural parents enjoy, was to adopt his children, thereby obtaining the status of a legal parent.

Although, adoption is and was theoretically open to Peter Stanley, it is and was even more unavailable as a practical matter than the obtaining of appointment as guardian or custodian. The impossibility of adoption is best illustrated by the fact that although the trial court, prosecutor, probation officer, and Peter Stanley's counsel in the court below all had suggestions about how Peter Stanley might regain the custody and control of his children, none of these persons, knowledgeable in the workings of the juvenile court, even suggested or even hinted that adoption was a possibility. An adoption proceeding is by no means a simple legal proceeding as is shown by any practice manual, e.g. Ill. Inst. for Continuing Legal Education, *Illinois Family Law II—Legal Problems of the Illinois Family*, Chap. 9 (1969). Moreover, since Peter Stanley's children were wards of the juvenile court, before an adoption could take place the permission of that court would be required, § 5-9. Since adoption would free Peter Stanley from the control of the juvenile court, all those factors which would inhibit his appointment as custodian or guardian by that court would operate even more forcefully to prevent Peter Stanley from receiving juvenile court approval to adopt his children. It is quite probable that before the juvenile court would permit Stanley to adopt his children, it would have appointed him as custodian and then observed his "performance" through the watchful eye of the probation officer who originally filed the unfounded neglect petitions against him. Peter Stanley would also undoubtedly be subject to an intensive investigation by the adoption court to determine his fitness to be an adoptive parent, *Ill. Rev. Stat.*, Ch. 4, § 9.1-6 (1969). Ironically, the independent investigation by the adoption court would not be mandatory because the adoption act, recognizing that biological rela-

tionships are important, provides that when the person seeking to adopt is related by blood or marriage to the child, an investigation of the prospective adoptive parent is a matter of discretion, *Ill. Rev. Stat.*, Ch. 4, § 9.1-6 (1969). However, it is difficult to believe that the adoption court judge would not order an investigation of Peter Stanley. Thus, whatever might be or have been Peter Stanley's chances of being appointed custodian or guardian, his chances for adoption were even less. However, even were it further conceded that there was a practical possibility that Peter Stanley could have adopted his children, the legal posture of this case is still not changed.

The record in the proceedings below demonstrates the frustrating position in which Peter Stanley was placed. Although he had acknowledged, supported, established a familial relationship with and neither neglected nor abused his children, when his common-law wife died he was converted from a loving father into a disadvantaged stranger to his children. Despite a suggestion that the future held a possibility that he might be appointed custodian or guardian by the juvenile court, Peter Stanley recognized that Illinois law and his personal circumstances made that possibility a theoretical and practical impossibility. These same factors rendered the theoretical possibility of adoption a similar impossibility. Moreover, since the Juvenile Court Act specifically provides only for an appeal of the adjudication of wardship, § 4-8 (3), Peter Stanley took the only avenue open to him and appealed the decision of the juvenile court adjudicating his children dependent and wards of the juvenile court. However, Peter Stanley's appeal from the adjudication of dependency and wardship places this case in the precise posture necessary for principled constitutional decision making under the Equal Protection Clause. The issue here is not whether Peter Stanley could or should be appointed guardian or custodian nor whether he could or should adopt his children. The issue here is whether the State of Illinois, simply because of Peter Stanley's sex, lack of a marriage certificate and untimely loss of his common-

law wife, can deny Peter Stanley the protection of the laws it affords all other natural parents even those who fail to acknowledge, support and establish a familial relationship with their legitimate and illegitimate children.

A. *The interest of an unwed father in continuing, after his common law wife's death, to be able to rear his children free from unwarranted governmental interference is fundamental and there is no compelling justification for nor necessity of the State interfering with this fundamental interest by the drastic means of declaring every unwed father a legal stranger to his child.*

"In determining whether or not a state law violates the Equal Protection Clause, we must consider the facts and circumstances behind the law, the interest which the state claims to be protecting, and the interest of those that are disadvantaged by the classification." *Williams v. Rhodes*, 393 U.S. 23, 30 (1968). In considering the facts and circumstances behind the law along with the interest the state claims to be protecting—the purpose of the statute—and the interest of those disadvantaged by the classification, this Court has recognized that when certain interests are disadvantaged the relationship between the statutory purpose and the discriminatory classification requires strict scrutiny. Such interests as freedom from discrimination based upon race, *McLaughlin v. Florida*, 379 U.S. 184 (1964), freedom from monetary discriminations for those involved in the criminal process, *Rinaldi v. Yeager*, 384 U.S. 305 (1966), freedom from discrimination based upon the fact of illegitimate birth, *Levy v. Louisiana*, 391 U.S. 68 (1968), or freedom from discrimination interfering with the exercise of constitutional rights or fundamental liberties, *Shapiro v. Thompson*, 394 U.S. 618, (1969), *Skinner v. Oklahoma*, 316 U.S. 535 (1942), require not only a statutory purpose reflecting the promotion of ". . . a compelling governmental interest . . .," *Shapiro v. Thompson, supra* at 634, but also require that the relationship between the statutory purpose and the discriminatory classification be ". . . carefully and meti-

culously scrutinized . . ." *Reynolds v. Sims*, 377 U.S. 533, 562 (1964). Other less significant interests such as freedom from discriminatory economic regulations, *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61 (1911); *Goeseart v. Cleary*, 335 U.S. 464 (1948), or the opportunity to cast an absentee ballot, *McDonald v. Board of Election Commissioners*, 394 U.S. 802 (1969), are subjected to a less rigid scrutiny and only a rational relationship between the discriminatory classification and any reasonably conceived permissible statutory purpose is required.

The interest of Peter Stanley disadvantaged, indeed, destroyed by the Illinois classification of "parents" challenged here is the right to be free from governmental intrusion upon and interference with the rearing of his children except under the same circumstances such intrusion and interference is allowed in the rearing of children by any other natural parents. Peter Stanley's interest in maintaining a familial relationship with his children like that accorded other surviving natural parents is an interest of a different tenor than the interest of a woman in being a barmaid, *Goeseart v. Cleary, supra*, the interest of a jailed accused in casting an absentee ballot, *McDonald v. Board of Election Commissioners, supra*, or the interest of a corporation in drilling into a rock to obtain mineral water, *Lindsley v. Natural Carbonic Gas Co., supra*.

A biological coupled with a familial relationship engenders a sanctimonious relationship deservant of this Court's special recognition. Indeed, ". . . biological relationship is the test that has been used—since time immorial—in our and other cultures for the fixing of support and other familial obligations, and it is the biological relationship that underlies and is traced by legal relationship." Krause, *Legitimate and Illegitimate Offspring of Levy v. Louisiana-First Decisions on Equal Protection and Paternity*, 36 U. Chi. L. Rev. 338, 345 (1969). The State of Illinois recognizes that the biological relationship alone is significant in the question of fitness to be a parent in its Adoption Act. The

Adoption Act provides that where the prospective adoptive parent is related by blood to the child to be adopted, an investigation as to adoptive parent's fitness is not mandatory, Ill. Rev. Stat., Ch. 4, § 9.1-6 (1969). However, where the prospective adoptive parent is not related by blood or marriage an investigation as to the prospective adoptive parent's fitness is mandatory. *(Id.)* This Court has recognized that the mere right to create a biological relationship is a fundamental one. *Skinner v. Oklahoma,* 316 U.S. 535 (1942). One who has exercised this fundamental right and then voluntarily acknowledged supported and established a familial relationship with his offspring, must enjoy an equally fundamental interest in maintaining that relationship free from unwarranted governmental interference. In *Glona v. American Guarantee and Liability Insurance Co.,* 391 U.S. 73 (1968) this Court recognized that biological and familial lines are significant and cannot be disregarded at the whim of the legislature. Moreover, we deal here with more than the mere interest of one person in the death of another; on the contrary, we deal with a father's interest in the life of his children and his maintenance of a familial relationship with them.

Although it has often been said that the common law gave the unwed father no right to custody of his illegitimate child, the attached historical appendix indicates that an unwed father's familial relationship with his illegitimate children, where consented to by the mother, would not be disturbed at common law. Interestingly, as late as 1949, even the State of Illinois recognized an unwed father's right to the custody and control of his children (Appendix II, *infra*) and even under the present statutes it was only the death of Peter Stanley's common law wife that allowed the State to interfere with this relationship.

More than Peter Stanley's biological relationship with his children is involved in this case. Practically all males can, in a biological sense, father children; but not all, within or without wedlock, can or are willing to assume the cultural

role of a father in a family relationship. Schneider, American Kinship—A Cultural Account, 42 (1968). Peter Stanley was not merely the biological progenitor of Kimberly and Peter, Jr. but was, indeed, their cultural father and their only natural parent. The fact Peter Stanley was a voluntarily acknowledging and supporting father who had created and maintained a family is not changed by the mere presence or absence of a marriage certificate:

> "A man and a woman may live together outside the legal tie of marriage for a variety of realistic reasons, the most common being an undissolved marriage on the part of one or both. In many such situations the couple establishes a home and raises a family of children. Except for the legal factor, this may be a family like any other. Psychologically, the parents are not an unmarried mother and an unmarried father, and they do not show the same personality problems or act out the same behavior. The very fact that they are parents in the social and emotional as well as the biological sense distinguishes them immediately from the unmarried mother and the unmarried father who establish no real or lasting relationship with each other." Young, *Out of Wedlock*, 147 (1954).

Peter Stanley's interest in being recognized as the good parent he is, in being treated similarly to other natural parents and, thereby, in being freed from governmental intrusion upon his rearing of his children is a fundamental interest with which the State cannot tamper without very good reason.

> "(S)tatutes regulating sensitive areas of liberty do, under the cases of this Court, require 'strict scrutiny' . . ., and must be viewed in the light of less drastic means for achieving the same basic purpose . . .'. 'Where there is a significant encroachment upon personal liberty, the State may prevail only upon showing a subordinating interest which is compelling.'"

Griswold v. Connecticut, 381 U.S. 479, 503-504 (White J., concurring–Citations Omitted) (1965). The only purposes put forward by the State as justifying the classifying of Peter Stanley as a stranger to his children are that the classification makes administration of the Adoption Act more convenient and the classification serves the best interests of minors by locating good parents. (See *infra*, pp. 25-30) However, administrative convenience is never a sufficiently compelling interest to justify encroachment upon a fundamental interest. *Rinaldi v. Yeager*, 384 U.S. 305 (1966); *Shapiro v. Thompson*, 394 U.S. 618 (1968). Moreover, the State of Illinois can certainly ferret out good and bad parents by means less drastic than the blanket categorization of *all* unwed fathers as bad parents. Indeed, the Juvenile Court Act itself provides the means for locating such parents through the neglect proceedings previously described. The failure of the State to show a compelling governmental interest for its classification and the recognition that there are less drastic means for accomplishing any legitimate interests the State may claim renders the classification under review violative of the Equal Protection Clause. The adjudication of Peter Stanley's children as dependent and wards of the Juvenile Court, by application of this classification, must be reversed.

B. *The Juvenile Court Act's classification of unwed fathers as non-parents is violative of the Equal Protection Clause for it is not rationally related to any reasonably conceived, legitimate state interest.*

According to Justice Holmes classic formulation of equal protection clause analyses, ". . . the law does all that is needed when it does all that it can, indicates a policy, applies it to all within the lines, and seeks to bring within the lines all similarly situated so far as so fast as it means allow." *Buck v. Bell*, 274 U.S. 200, 208 (1927). Similarly, in *F. S. Royster Guano v. Virginia*, 253 U.S. 412 (1920), this Court stated that, ". . . the classification must be reasonable, not arbitrary, and it must rest upon some ground

of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." (*Id.* at 14) In applying this traditional standard to ascertain whether a statutory classification has unconstitutionally failed to include all those it should have included, we must examine whether the discriminatory classification bears any rational relationship to a legitimate state purpose. Traditional analysis allows the State considerable latitude in erecting purposes which might justify the discriminatory classification. The only limitation upon the ingenuity of the State's inventiveness is that the asserted statutory purpose must be reasonably conceived and the purpose claimed cannot be constitutionally inpermissible. *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78-80 (1911); *McDonald v. Board of Election Commissioners*, 394 U.S. 802, 808-809 (1969).

Since the Illinois Juvenile Court Act sets forth an explicit statement of its purposes and since the opinion below and the State both in the Illinois Supreme Court (Brief for Appellee in Illinois Supreme Court, pp. 15-17) and in this Court (Brief For Respondent In Opposition, pp. 8-11) relied solely upon the purposes set forth in the Juvenile Court Act to justify the statutory classification, the Petitioner would ordinarily hesitate to suggest any other purposes could be reasonably conceived as justifying the discriminatory treatment of unwed fathers. However, because the legislative history reveals clearly that the purpose of the Illinois discriminatory treatment of unwed fathers was to promote the efficient administration of Illinois adoption proceedings, the Petitioner will also treat this one other conceivable purpose justifying the discriminatory classification of unwed fathers of illegitimate children.

1. **The Purpose of the Classification of Unwed Fathers As Non-Parents Was Not to Serve the Best Interests of Children and the Classification Is Not Rationally Related to that Asserted Purpose.**

The Juvenile Court Act states as its purpose:

> "The purpose of this Act is to secure for each minor subject hereto such care and guidance, preferably in his own home, as will serve the moral, emotional, mental and physical welfare of the minor and the best interests of the community; to preserve and strengthen the minor's family ties whenever possible, removing him from the custody of his parents when his welfare of safety or the protection of the public cannot be adequately safeguarded without removal; and, when the minor is removed from his own family, to secure for him custody, care and discipline as nearly as possible equivalent to that which should be given by his parents, and in cases where it should and can properly be done to place the minor in a family home so that he may become a member of the family by legal adoption or otherwise." § 1-2.

This laudatory statement would seem to prescribe that the State of Illinois would do all possible not only to maintain but to promote and encourage Peter Stanley's previously established familial relationship with his children. However, concentrating solely on the guideline of protecting the safety and welfare and promoting the best interests of minor children, Illinois has determined that upon the death of the mother of illegitimate children it should, under all circumstances, terminate the previously established and maintained filial relationship of the unwed father with his children. The State then allows the unwed father the possibility of partially reasserting the familial relationship by being appointed custodian or guardian by the juvenile court and allows him fully to reassert this previous relationship with the children only under the even more tenuous possibility that he could adopt his children.

There is no inherent relationship, let alone a rational one, between promoting the best interests of children and the classification of unwed fathers as strangers to their illegitimate children. In its search for ways in which the classification of unwed fathers as non-parents promotes the best interests of children, the State first suggested that the classification does this by encouraging adoption. In the Illinois Supreme Court the State argued that the "first and most important reason" for the discriminatory treatment was that it encourages adoption, and adoption has the benefit of allowing the adopted child to take intestate from the unwed father. The State also suggested that adoption is beneficial as it removes "the stigma of illegitimacy."

Both arguments are misplaced for Illinois' treatment of unwed fathers discourages them from seeking adoption and it is evident that no legislator could have been seeking either end by the classification of unwed fathers as non-parents.

Since Illinois treats the unwed father as a stranger to his children, it would be extremely unwise for him to petition for adoption of his children. The unwed father would recognize that by so petitioning he would alert State officials to the fact he was not married to the children's mother. If, as in Peter Stanley's case, the children's mother is deceased and the father is not wealthy he will recognize that the alerting of these officials will cause a Dependency Petition to be filed in the juvenile court which undoubtedly will result in his children being removed from his custody and control. Moreover, the unwed father will recognize that the investigation of his parental suitability will alert friends and neighbors to the fact he and his common-law wife were and are not married. Indeed, this investigation will create and far spread the "stigma of illegitimacy" by alerting friends and neighbors to the out of wedlock birth of his children about which they may not have known. The unwed father would also be discouraged by the cost of obtaining legal assistance and the cost of the adoption proceedings themselves, *cf. Boddie v. Connecticut*, 38 U.S. Law

the State does not interfere in the father's relationship with his children except under the same circumstances it would interfere with the child rearing by parents of legitimate children. Finally, the statute does not attempt to ferret out neglectful or abusive parents for as the record below shows no evidence as to neglect was introduced and, indeed, Peter Stanley's placement of his children with his trusted friends was confirmed as a wise act by the trial court's appointment of the Ness' as guardians.

It should be apparent that attributing this narrow purpose to the statutory classification involves nothing more than inquiring into the effect of the classification, labeling the observed effect as the statute's purpose and asserting that, since the purpose is related to the classification the classification is not violative of the equal protection clause. Despite such phrasing of the classification's purpose in terms of its effect, analysis of the actual operational effect of the statute demonstrates that the purpose of the classification was simply not to locate suitable and unsuitable persons to assume parental control.

In its Brief In Opposition filed in this Court the State asserts, "The record in this case is totally devoid of relevant facts concerning Stanley's suitability for custody of minor children other than his prolonged relationship with the mother and familiarity with the children." (Respondents Brief in Opposition, p. 10, n. 7) Although an inaccurate categorization of the record, (see, *supra*, pp 5, 11) if, in fact, the record was "devoid of relevant facts concerning Stanley's suitability for custody" how can it be conceived that the purpose of the classification was in fact to locate suitable and unsuitable parents. Indeed, the State seemingly concedes this is not the classification's purpose for it says, "Whether Petitioner Stanley is a proper guardian for minor children . . . is irrelevant to the Equal Protection analysis." (Respondents Brief In Opposition, p. 11, n. 7) If the very purpose of the classification is to locate good and bad parents for minor children after their mother's death, the issue

of whether the [illegible]er is a proper parent cannot be irrelevant to analysis of the statute's validity under the Equal Protection Clause. However, even were we to assume that the purpose of the classification was to search out and provide only suitable unwed fathers as parents for motherless illegitimate children, the purpose is unrelated to the classification because two necessary presumptions which underlie the relationship are unfounded.

Since the purpose of classifying unwed fathers as non-parents is, assertedly, to allow only "suitable," not merely non-neglectful, unwed fathers to assume parental control, we must presume that as a general matter removing children from the custody and control of unwed fathers, at least until the fathers can demonstrate their suitability for parenthood, is not adverse to the children's best interests. We must also presume that the juvenile court facilities are capable of and are able to find replacements for the children at least as good as that provided by the unwed father. Neither presumption is warranted.

"Psychologists caution against severing the child from his father and mother images, one formed or reformed, and courts today, accept by judicial notice that this is detrimental to the child." Comment, 1968 U. Ill. L. Forum 232, 233 (1968).[6] The abrupt severing of family ties and filial relationships has been described for the child as an experience ". . . pregnant with pain and terror for him and potentially damaging to his personality and normal growth." Young, *Placement From The Child's Viewpoint*, 31 Social Casework 250-251 (1950). This experience must be even more frightening and detrimental when it has been preceded by the untimely death of the child's mother. Adoption agencies accept as a *sine qua non* of their work the principle

[6]See generally, Spitz, The First Year of Life (1965); A. Freud & Burlingham, War & Children (1944); Anthony & Benedek, (eds.) Parenthood, Ch. 27 (1970).

that a child should be placed with a family as early as possible after birth and this relationship should not be disturbed. Indeed, the latter principle has been urged as justifying Statutes, e.g. Ill. Rev. Stat., Ch. 4, § 9.1-8(e) (1969), that provide the putative father of an illegitimate child need not be notified of a pending adoption proceeding, e.g., *Father of an Illegitimate Child–His Right to be Heard,* 50 Minn. L. Rev. 1071 (1966). Moreover, "(w)eak parents need help. They do not need the final failure and degradation of filial deprivation. The child needs his own place in a real home–however underprivileged." Dobson, *The Juvenile Court And Parental Rights,* 4 Family L. Q. 393, 408 (1970). Illinois has recognized both of these principles by providing that before a child may be taken from a legal parent, it must not only be shown by a preponderance of the evidence that the child has been neglected but it also must be shown that it is in the best interest of the child that he be declared a ward of the juvenile court and it must further be shown that the parent is unable and unfit for reasons other than financial circumstances alone to properly care for the child. Furthermore, even upon a conviction for the criminal offense of contributing to the dependency or neglect of a minor, the legislature has made special provision for keeping the child with the erring parent. Ill. Rev. Stat., Ch. 23, § 2361 (1969). Terminating the unwed father's familial relationship with his children without any indication as to whether or not he is or was a good parent and then making it extremely difficult, if not impossible, for him to resume the familial relationship can only disserve the best interests of children.

The second presumption that must be made in order to support the proposition that the State is acting in the best interest of the child in not affording the unwed father any rights to parental control of his children is that the State, in its role as *parens patriae,* is able to make good placements of children who have been taken from their natural parent's custody and control. This Court recognized in *In*

Re Gault, 387 U.S. 1, 27 (1967) that despite good intentions the states were unable to perform the role of the kindly and humane *parens patriae* with respect to delinquent children. Unfortunately, the situation is no better respecting dependent and neglected children. The term *parens patriae* as applied to dependent children in the State of Illinois in almost all cases means for the child a series of foster homes. In Illinois dependent children are usually under the guardianship of the Illinois State Department of Children and Family Services. It is not uncommon for a dependent child to be in 8 or 10 foster homes and have an equal number of caseworkers before he reaches majority. Moreover the agencies who are guardians of dependent children are often inadvertently inhuman due to bureaucracy, inefficiency and depersonalization. See e.g. *Murphy NLADA Juvenile Court Project*, 27 Legal Aid Briefcase 223 (June 1969). A periodical published by the Illinois Department of Children and Family Services entitled Perspective recently painted the following bleak picture:

> "(T)he deck is stacked against the dependent child in Cook County. In a city groaning under a massive, shifting population which contributes to the family breakdown, Chicago suffers from an acute shortage of shelter care facilities for abandoned and neglected children, lack of trained child welfare workers, and not enough money to remedy the problem." 5 Perspective 4, 5 (March 1969).

The 1970 Report of the Illinois White House Conference on Children and Youth confirmed the latter:

> "The dearth of foster homes and diversified institutional facilities, means that decisions about where to place are generally based upon availability rather than suitability; that children are being deprived of foster care because of the accident of geography, color, or the circumstances that dictate the need; and that foster parents or institutions are being asked to take children, both in kind and number, which extend their limits beyond the point where

> they can function effectively. Further, foster families usually lack community status, reimbursement, training, and professional counsel. Natural families often do not get the help they need to reconstruct their families, to release their children for adoption, or to be positively involved in the life of their children who grow up in foster care. Report Of Illinois White House Conference On Children and Youth, 62 (May, 1970).

It is, thus, clear that the State of Illinois classification of unwed fathers as non-parents which results in severing his parental control of the children with only the smallest likelihood that he can regain the control not only fails to serve the best interest of the children but is actually detrimental to them. Furthermore, the assumption that Illinois in its *parens patriae* function can perform better than even mediocre unwed fathers is simply unfounded and it cannot be asserted that it is in the best interest of children in general to allow the State to perform that function upon these children.

2. Classification of Unwed Fathers as Non-Parents Actually Disserves the Purpose of Better Administering the Adoption Act.

An examination of the facts and circumstances behind the Illinois classification rendering the unwed father a stranger to his children indicates that the purpose of the classification was to speed and finalize Illinois adoption proceedings. As the attached historical appendix (*infra*, pp. 51-65) details more fully, from 1827 until 1872 the putative father of an illegitimate child in Illinois had the right to demand control and charge of the illegitimate child from the mother and if she failed to give the child over to the father, the father was released from any duty of support. From 1872 until 1949 the Illinois Bastardy Act provided that the right to elect to assume control and charge of the child did not occur until the child was 10 years of age. In

1946 the Illinois Attorney General was requested to issue an opinion as to whether the natural father of an illegitimate child should be named in a petition for the child's adoption. On 18 December 1946 the Illinois Attorney General answered this question in the affirmative. 1946 Op. Ill. Att'y. Gen. 58. The opinion noted that the Illinois appellate courts had not specifically decided the question of whether the putative father must be named in an adoption petition. However, the Illinois Attorney General believed that whenever the putative father had been adjudicated the parent under the Bastardy Act he had to be named in the adoption proceeding. Moreover, the Attorney General found that in those situations where paternity had not been adjudicated, the adoption court judge had to appoint a guardian with the right to consent to adoption in order to assure the adoption proceedings properly terminated a putative father's potential right to custody. Less than three years later the Illinois General Assembly amended the Bastardy Act to provide "The reputed father of a bastard child shall have no right to the custody or control of such child." Ill. Rev. Stat., Ch. 17, § 13 (1949). This prohibition of the putative father obtaining custody and control of his children is now contained in Section 62 of the Illinois Paternity Act, *Ill. Rev. Stat.*, Ch. 106-3/4, § 62 (1969). "As was pointed out in 46 Ill. L. Rev. 156 (1951), 'Rights of a Father Toward His Illegitimate Child in Illinois' Sec. 62 was originally enacted to avoid conflicts with the adoption Act then in force . . . ." *Wallace v. Wallace*, 60 Ill. App.2d 300, 210 N.E. 2d 4, 5 (1st Dist. 1965). The author of the law review article cited by the Illinois Appellate Court demonstrates clearly that the purpose of the revision of the Bastardy Act was not so much to alter the status of the putative father as to conform the Bastardy to the Adoption Act. The meager historical materials available concerning enactment of the present Juvenile Court Act in 1965, Trumbull, *Proposed New Juvenile Court Act For Illinois*, 53 Ill. Bar. J. 608 (1965), indicate no reason for the classification of unwed fathers as non-parents other than the

obvious one of conforming the Juvenile Court Act definition of parents to the definitions prevailing under the adoption and paternity laws. Thus, the reason for the discriminatory treatment of unwed fathers found in the Juvenile Court Act was merely in order to serve the administrative convenience of adoption proceedings.

Unlike the other purposes set forth as justifying the treatment of the unwed father as a non-parent, convenience in the administering of the Adoption Act may reasonably be conceived as the original purpose of the classification. There is, however, no rational relationship between speeding up and finalizing adoption proceedings and treating the unwed father as a stranger to his children under the Juvenile Court Act. Indeed, administrative convenience in adoption proceedings is disserved by the discriminatory treatment under the Juvenile Court Act.

If one assumes that the discriminatory treatment of unwed fathers encourages them to file adoption petitions for the purpose of obtaining the parental status the State has taken from them, the result merely would be to clog the adoption courts. Moreover, since the primary purpose of adoption acts is to find homes for children who have no home or family willing to care for them, to clog the adoption courts with natural parents desirous of maintaining an established filial relationship with their children is to impose a burden without any significant benefit for the juvenile court can, supposedly, find "suitable" parents and is entrusted with that function in the first instance. Furthermore, it is difficult to see how one would keep an unwed father, like Peter Stanley, who has acknowledged, supported and maintained a familial relationship with his children away from the adoption proceeding simply by not formally notifying him. Certainly, this Court can not presume the State has as its purpose increasing the supply of adoptable children by perfunctorily removing them from the control of unwed fathers who express an interest and desire in retaining parental control over their children.

Aside from the fact that it is by no means clear that there would be any detrimental effect upon adoption proceedings were putative fathers to be notified of pending adoption proceedings, Comment, 1968 U. Ill. L. Forum 232 (1968), and aside from the fact involving putative fathers in the adoption process is increasingly being recognized as in the best interest of the child and the father,[7] the injection of the adoption proceeding effects argument into this case is spurious. We deal here with a readily identifiable class of unwed fathers, those who have acknowledged, supported, established a familial relationship with and not neglected or abused their children and who are desirous of maintaining that relationship after the children's mother's death. Adoption proceedings are and should only be concerned with a readily non-identifiable class of unwed fathers whose lack of identity indicates they have no interest or desire in providing a family and home for their children.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment of the Court below should be reversed.

LEWIS A. WENZELL

PATRICK T. MURPHY
Attorneys for the Petitioner

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[7] Burgess, *The Unmarried Father In Adoption Planning*, 15 Children 71 (March-April 68); U.S. Children's Bureau, Dept. Health, Education & Welfare, The Unmarried Father–Demonstration and Evaluation of an Assertive Casework Approach (1967); Child Welfare League of America, Standards For Adoption Services (1958); Anglim, *The Adopted Child's Heritage–Two Natural Parents*, 44 Child Welfare 339 (1965).

APPENDIX I

APPENDIX I

RELEVANT SECTIONS OF ILLINOIS JUVENILE COURT ACT

Juvenile Court Act, § 1-2; Ill. Rev. Stat., Ch. 37, § 701-2 (1969).

> Purpose and Policy.) (1) The purpose of this Act is to secure for each minor subject hereto such care and guidance, preferably in his own home, as will serve the moral, emotional, mental, and physical welfare of the minor and the best interests of the community; to preserve and strengthen the minor's family ties whenever possible, removing him from the custody of his parents only when his welfare or safety or the protection of the public cannot be adequately safeguarded without removal; and, when the minor is removed from his own family, to secure for him custody, care and discipline as nearly as possible equivalent to that which should be given by his parents, and in cases where it should and can properly be done to place the minor in a family home so that he may become a member of the family by legal adoption or otherwise.

Juvenile Court Act, § 1-4; Ill. Rev. Stat., Ch. 37, § 701-4 (1969).

> Adjudicatory hearing.) "Adjudicatory hearing" means a hearing to determine (a) whether the allegations of a petition under Section 4-1 that a minor is otherwise in need of supervision, neglected or dependent are supported by a preponderance of the evidence or whether the allegations of a petition under Section 4-1 that a minor is delinquent are proved beyond a reasonable doubt, and (b) whether a minor should be adjudged to be a ward of the court.

Juvenile Court Act, § 1-10; Ill. Rev. Stat., Ch. 37, § 701-10 (1969).

"Dispositional hearing" means a hearing to determine what order of disposition should be made in respect of a minor adjudged to be a ward of the court.

Juvenile Court Act, § 1-11; Ill. Rev. Stat., Ch. 37, § 701-11 (1969).

"Guardianship of the person" of a minor means the duty and authority, subject to residual parental rights and responsibilities, to make important decisions in matters having a permanent effect on the life and development of the minor and to be concerned with his general welfare. It includes but is not necessarily limited to (a) the authority to consent to marriage, to enlistment in the armed forces of the United States, or to a major medical, psychiatric, and surgical treatment; to represent the minor in legal actions; and to make other decisions of substantial legal significance concerning the minor;

(b) the authority and duty of reasonable visitation, except to the extent that these have been limited by court order; (c) the rights and responsibilities of legal custody except where legal custody has been vested in another person or agency; and (d) the power to consent to the adoption of the minor, but only if expressly conferred on the guardian in accordance with Section 5-9.

Juvenile Court Act, § 1-12; Ill. Rev. Stat., Ch. 37, § 701-12 (1969).

"Legal custody" means the relationship created by an order of court which imposes on the custodian the responsibility of physical possession of a minor and the duty to protect, train and discipline him and to provide him with food, shelter, education and ordinary medical care, except as these are limited by residual parental rights and responsibilities and the rights and responsibilities of the guardian of the person, if any.

Juvenile Court Act, § 1-14; Ill. Rev. Stat., Ch. 37, § 701-14 (1969).

Juvenile Court Act, § 4-1 (1), (2); Ill. Rev. Stat., Ch. 37 § 704-1 (1), (2) (1969).

> Petition; Supplemental Petitions.) (1) Any adult person, any agency or association by its representative may file, or the court on its own motion may direct the filing through the State's Attorney of a petition in respect of a minor under this Act. The petition and all subsequent court documents shall be entitled 'In the interest of . . ., a minor.' (2) The petition shall be verified but the statements may be made upon information and belief. It shall allege that the minor is delinquent, otherwise in need of supervision, neglected or dependent, as the case may be, and set forth (a) facts sufficient to bring the minor under Section 2-1; (b) the name, age and residence of the minor; (c) the names and residences of his parents; (d) the name and residence of his legal guardian or the person or persons having custody or control of the minor, or of the nearest known relative if no parent or guardian can be found; and (e) if the minor upon whose behalf the petition is brought is detained in custody, the date on which detention was ordered by the court or the date set for a detention hearing. If any of the facts herein required are not known by the petitioner, the petition shall so state.

Juvenile Court Act, § 4-6; Ill. Rev. Stat., Ch. 37, § 704-6 (1969)

> Evidence at Adjudicatory Hearing.) At the adjudicatory hearing, the court shall first consider only the question whether the minor is a person described in Section 2-1. The standard of proof and the rules of evidence in the nature of criminal proceedings in this State are applicable to Section 2-2. The standard of proof and the rules of evidence in the nature of civil proceedings in the State are applicable to Sections 2-3, 2-4, and 2-5.

Juvenile Court Act, § 4-8; Ill. Rev. Stat., Ch. 37, § 704-8 (1969).

Findings and Adjudication.) (1) After hearing the evidence the court shall make and note in the minutes of proceedings a finding of whether or not the minor is a person described in Section 2-1. If it finds that the minor is not such a person or that the best interests of the minor and the public will not be served by adjudging him a ward of the court, the court shall order the petition dismissed and the minor discharged from any detention or restriction previously ordered in such proceeding.

(2) If the court finds that the minor is a person described in Section 2-1 and that it is in the best interest of the minor and the public that he be made a ward of the court, the court shall note in its findings whether he is delinquent, otherwise in need of supervision, neglected or dependent, specifying which of Sections 2-2 through 2-5 is applicable, and shall adjudge him a ward of the court and proceed at an appropriate time to a dispositional hearing.

(3) An adjudication of wardship hereunder is a final judgment for purposes of appeal. The appellee shall be the People.

Juvenile Court Act, § 5-1 (1); Ill. Rev. Stat., Ch. 37, § 705-1 (1) (1969).

Dispositional Hearing; Evidence Continuance.) (1) After adjudging the minor a ward of the court, the court shall hear evidence on the question of the proper disposition best serving the interests of the minor and the public. All evidence helpful in determining this question, including oral and written reports, may be admitted and may be relied upon to the extent of its probative value, even though not competent for the purpose of the adjudicatory hearing.

Juvenile Court Act, § 5-2 (1), (d), (3); Ill. Rev. Stat., Ch. 37, § 705-2 (1), (d), (3) (1969).

Kinds of Dispositional Orders.) (1) The following kinds of orders of disposition may be made in

respect of wards of the court: (d) A minor under 18 years of age found to be dependent under Section 2-5 may be placed in accordance with Section 5-7. (3) Unless the order of disposition expressly so provides, it does not operate to close proceedings on the pending petition, but is subject to modification until final closing and discharge of the proceedings under Section 5-11.

Juvenile Court Act, § 5-7 (1), (a), (f), (2); Ill. Rev. Stat., Ch. 37, § 705-7 (1), (a), (f), (2) (1969).

Placement; Legal Custody or Guardianship.) (1) If the court finds that the parents, guardian or legal custodian of a minor adjudged a ward of the court are unfit or are unable, for some reason other than financial circumstances alone to care for, protect, train or discipline the minor or are unwilling to do so, and that it is in the best interest of the minor to take him from the custody of his parents, guardian or custodian the court may (a) place him in the custody of a suitable relative or other person; (f) in the case of a neglected or dependent minor under 18 years of age adjudged a ward of the court under Section 2-4 or 2-5, commit him to the Department of Children and Family Services for care and service. The Department shall be given due notice of the pendency of such action and the Guardianship Administrator of the Department shall be appointed guardian of the person of such minor. Whenever the Department discharges a minor from its care and service, the Guardianship Administrator of the Department shall petition the court for an order terminating guardianship.

(2) When making such placement, the court, whenever possible, shall select a person holding the same religious belief as that of the minor or a private agency controlled by persons of like religious faith of the minor. In addition, whenever alternative plans for placement are available, the court shall ascertain and consider, to the extent appropriate in the particular case, the views and preferences of the minor.

Juvenile Court Act, § 5-8; Ill. Rev. Stat., Ch. 37, § 705-8 (1969).

> Reports of Custodian or Guardian; Change of Custody.) (1) The court may require any legal custodian or guardian of the person appointed under this Act to report periodically to the court or may cite him into court and require him or his agency, to make a full and accurate report of his or its doings in behalf of the minor. The custodian or guardian, within 10 days after such citation, shall make the report, either in writing verified by affidavit or orally under oath in open court, or otherwise as the court directs. Upon the hearing of the report the court may remove the custodian or guardian and appoint another in his stead or restore the minor to the custody of his parents or former guardian or custodian. (2) The minor or any person interested in the minor may apply to the court for a change in custody of the minor and the appointment of a new custodian or guardian of the person or for the restoration of the minor to the custody of his parents or former guardian or custodian. No legal custodian or guardian of the person may be removed without his consent until given notice and an opportunity to be heard by the court.

Juvenile Court Act, § 5-9 (1); Ill. Rev. Stat., Ch. 37, § 705-9 (1) (1969).

> Adoption; Appointment of Guardian With Power to Consent.) (1) A ward of the court under this Act, with the consent of the court, may be the subject of a petition for adoption under "An Act in relation to the adoption of persons, and to repeal an Act therein named," approved July 17, 1959, as heretofore or hereafter amended, or with like consent his parent or parents may, in the manner required by such Act, surrender him for adoption to an agency legally authorized or licensed to place children for adoption.

APPENDIX II

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APPENDIX II

NULLIUS FILIUS*

The common law designation of a bastard child as *nullius filius*, or the child of nobody has often been cited in support of a common law rule denying custody to the putative father. In fact, the concept of *nullius filius* is an aberration of the English laws of inheritance which was outside the western tradition of family law, and even in England, had nothing to do with parental rights or child custody. It is only through an unfortunate misunderstanding of family law that it has been cited as an example of the barbaric common law treatment of illegitimate children. Actually, the stigma attached to bastards and their parents was of Medieval moral and religious origin and was in many respects mitigated rather than aggravated by the common law of England.

Roman and Medieval law was interested in the bastard as a factor in the orderly descent of real and personal property through family lines. His custody and welfare were of no significance to the law, except as it was influenced by the Christian Church's crusade against sexual "immorality." In early Rome, the bastard child was, by law, excluded from the family intestacy inheritance. However, there was nothing in Roman law to prevent a father from spontaneously providing for his illegitimate children during his lifetime, through his last will, or by adoption. F. Blume, *Legitimation under Civil Law*, 5 Tul. L.R. 256, 257 (1931). Under the rule of the Emperors, marriage changed from a sacrement to a contract, divorce became easier and, after Augustus, concubinage was recognized by law. *Id.* Naturally the problem of bastard children increased.

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*A Brief history of the origins of the common law concept of *nullius filius* and its relationship to the parental rights of the putative father, prepared by Clara Ann Bowler, staff attorney, Legal Aid Bureau, Chicago, Illinois.

Constantine began what was to become the Christian era of illegitimacy law by, on the one hand, prohibiting the father from passing property to his bastard children by will and, on the other hand, providing for the legitimation of bastards by subsequent marriage of the parents. *Id.*; see also, H. J. Wolff, *The Background of the Postclassical Legislation of Illegitimacy*, 3 Seminar 21, 23 (5 Jurist, 1945).

It has been suggested that Constantine and later Christian Emperors were torn

> "between Christian morality which abhorred extra-marital sex relations, and Christian *misericordia*, which sought to alleviate the lot of children born of such intercourse."
>
> H. J. Wolff, *supra*, at 23.

A less charitable view is that Constantine was hypocritically seeking a method of legitimating his own bastard son Cripus, while simultaneously striking a blow against pagan concubinage. At any rate, the late Roman position as codified by Justinian in 539 A.D. was somewhat less severe. Nov. 89, see abridged trans. in F. Blume, *supra*, at 263. Three methods of legitimation were provided: 1) membership in the local senate, 2) marriage to a local senator, and 3) imperial rescript. The right of testate inheritance was restored and an intestacy portion of one-sixth was preserved for legal concubines and bastard children. F. Blume, *supra*, at 258.

Two peculiar characteristics of Justinian's illegitimacy law should be noted. 1) Justinian's provisions applied only to the the issue of lawful concubinage relationships known as *filius naturalis* and not to irregular extra-marital misadventures. 2) Not only was the relationship between man and concubine recognized at Roman law, but a new legal relationship of *filius naturalis* was established between the father and his illegitimate children. Before Justinian, *filius naturalis* was the biological relationship between the father and children who had been given in adoption or dismissed from the family by emancipation. The term *naturalis* had also referred to the relationship between a master and his

slave-child as well as the children of cohabiting slaves. H. J. Wolff, *supra*, at 24. Unlike later English common law, Justinian's statutes gave the biological relationship of a father to his bastard children a formal legal status as *filius naturalis*, at least to the extent that the children were born of a recognized concubinage relationship. This is not to imply, however, that English common law did not recognize the tie between a bastard child and his biological parents in proceedings for maintenance and custody.

Although the Medieval Church eventually outlawed concubinage, the Roman classification of *filius naturalis* who can be legitimated and inherit and "bastards" who cannot, is preserved in the Continental and canon law distinctions between "natural children" and bastards according to the particular relationship which begot them. (For an American example of the Continental Roman approach see La. Civ. Code Ann., Art. 202, 200, 920 (West 1952)). Blackstone justly observed that those illegitimate children who could not be qualified as natural children under Roman law were treated much more harshly than any bastards at English common law. (1 W. Blackstone, Commentaries on the Laws of England, ch. 16, at 454 (Cooley ed., 1879)). It should be further noted that Constantine's policy of simultaneously heaping disabilities upon the products of extra-marital sex relations and mitigating their effect through legitimation proceedings had become the accepted standard for Continental Europe during the Middle Ages and was still in effect at Blackstone's time.

For unknown reasons, England, after the Norman Conquest rejected both the church inspired disabilities of the bastard and the Roman intermediary status of *filius naturalis*. By the 13th century, the King's Courts were consistently holding that a bastard was *filius nullius*, the child of nobody and therefore could not be the heir of either biological parent. 2 Pollock & Maitland, The History of

English Law before the Time of Edward I, at 394 (2d ed. reissued, 1968). Like Justinian's statutes, the King's Courts were primarily concerned with bastards as a probate problem rather than a social problem. Outside of his inability to inherit, the English bastard suffered no disabilities and in a few circumstances was actually favored by the King's law.

In assessing the position of the bastard at common law it is important to remember that he was neither unfree or incompetent by reason of his birth as was his counterpart in France and Germany. 2 Pollock & Maitland, *supra*, at 394. Under Anglo-Saxon and early English law, a bastard born of a bondswoman was considered a serf regardless of his father's status. However, by the 14th Century the King's Courts had adopted the rule that a child takes the status of his father, and a bastard being *filius nullius*, or having no father must always be born free *Id.* at 407. Thus, throughout the High Middle Ages, the legitimate child of an English serf was considered a serf, but his illegitimate child gained freedom with his bastard birth. Pollock and Maitland suggest that the bastard's favorable treatment under English law was

> "[d]ue to no deeper cause than the subjection of England to Kings who proudly traced their descent from a mighty bastard."
>
> 2 Pollock & Maitland, *supra*, at 395

Another explanation may be found in the consistent effort of the King's Courts to rationalize and simplify land holdings and inheritance. A serf was, afterall, only unfree because he was attached to a villenage which he received through inheritance. Absent the villenage, there was no need for the serf; in fact, if he were not free to seek an independent means of livelihood, he would become an unproductive drain on the resources of the manor. Because the Medieval manor was unable to support large numbers of bondsmen who had no land to till, it was ultimately

against the interest of both the lord and the serf family to restrain the freedom of bastards who could never inherit land holdings. Thus, the relentless logic of the King's Courts served to protect the line of descent in villenages in the same manner as it protected more prestigious land tenures.

After barring bastards from taking land as heirs in the interest of simplifying land tenures, it was only logical for the King's Courts to disallow legitimation by subsequent marriage of the parents or adoption. The Courts rationalized their harsh rules on legitimation by the fact English bastards suffered no temporal disabilities as they did on the Continent. Old English custom had allowed parents to legitimate their bastard children by placing them under the cloak which was spread over their parents during the marriage ceremony. It was said that this ceremony was observed when the children of John of Guant and Catherine Swinford were legitimated. However, this custom was not ordinarily accepted by the King's Courts. *Id.*, at 396 Ecclesiastical law also held that children born to parents who subsequently marry were to be legitimated for purposes of succession by their parents' marriage. Despite the rule of the ecclesiastical courts, however, the lords at the Parliament of Merton (20 Hen. III, The Provisions of Merton (1235-36)),

> "[w]ith one voice answered, that they would not change the laws of the realm, which hitherto have been used and approved."

Thereafter legitimation of bastards was prohibited by law until the legitimation statutes of the 20th century.

The attempts of the King's Court to simplify inheritance and land tenure through disinheriting bastards was constantly complicated by the prevelancy of *de facto* marriages which were not valid under ecclesiastical law. Since in England, as well as on the Continent, the Church was the sole arbitrator of the validity of a marriage, 2 Pollock & Maitland, *supra*, at 375-379, its elaborate system of im-

pediments giving rise to an action for annullment was commonly used as a means of divorce. *Id.* at 391, note 5. Ecclesiastical law held that the children born of a marriage entered into in good faith, but in fact barred by an impediment, were legitimate even though the marriage was later annulled. English law was more concerned with whether there ever was a divorce, although up to the 14th century children born before the divorce were not considered bastards. Ultimately, English law made the legitimacy of a child depend upon whether his parents, during their life, were in fact divorced. *Id.* at 374-375, 375 note 3. In a time when the valid marriage was the exception rather than the rule, and the status of children was a very circumstantial question, the King's Court was probably wise in not interjecting the problem into inheritance matters. It was also a measure of the strength of the English King, in an age where secular governments were struggling with the Church for their very existence, that the economically vital law of land tenure was kept out of that ecclesiastical jungle known as marriage law.

Although both the King and the lords of England had an interest in regularizing land tenure by excluding bastards, the lords were not anxious to allow land to escheat to the Crown for want of an heir. Because legitimacy was so uncertain under the marriage law, the King's Courts bent backwards to avoid bastardizing a child. The law presumed every child born to a married woman to be legitimate. Early cases almost never allowed the presumption to be rebutted. Even the later proof of non-access was often rejected. 2 Pollock & Maitland, *supra*, at 396. The question of the legitimacy of a dead man was not referred to the ecclesiastical courts, but instead sent to a jury of men who openly expressed themselves unwilling to "bastardize the dead." Eventually the law evolved that the bastard who enters his father's land as his heir and remains seized of the land throughout his entire lifetime will give a title to his children which cannot be impeached by other heirs of the father even though as a bastard, he could not by law be an heir *Id.* at 379-380.

Thus, the peculiar English rule of law which denied the relationship between a bastard and his father, was derived for purposes of inheritance only. On the one hand, the interest of the Crown and the lords in preserving untroubled family possession of land in the heir, cut off the claims of outside bastard children by denying their right to inherit. On the other hand, the lord's desire to produce an heir and avoid escheat to the Crown prompted the Courts to protect the assumed position of a bastard who was taken in by his father and presented as a legitimate child and heir. Because of the uncertainty of valid marriages under the ecclestiastical law, illegitimacy served as a tactical plea in the King's Courts when possession of land was at issue. If the inheritance was a villenage, one pleaded that he was a bastard to avoid becoming a serf. (See N. Adams, *Nullius Filius*, 6 U. Tor. L.J. 361, 378-380 (1946); N. Neilson, 47 Selden Society Year Book, 10 Edw. IV & 49 Hen. VI, at xxvi.) If the land was free, rival heirs pleaded illegitimacy against the heir in order to oust him from the heirship. (For example see, *Chamber v. Chamber*, 33 Selden Society Year Books, 5 Edw. II, at 161 (1312); 36 Selden Society Year Books, 7 Edw. II, at 95 (1313); N. Adams, *supra* at 365-374 (1946)).

The concept of bastards as a burden on the State rather than a private probate matter did not appear in England until the poor laws of Elizabeth I. The common law action of bastardy, now usually referred to as "paternity," was first set forth in 18 Eliz. I, ch. 3 (1575-76). The legislative purpose was stated as follows:

> "Concerning Bastards begotten and born out of lawful Matrimony, (an Offense against God's Law and Man's Law) the said Bastards being now left to be kept at the charges of the parish where they be born, to the great Burden of the same Parish, and in defrauding of the Relief of the impotent and aged true poor of the same Parish, and to the evil Example and Encouragement of lewd Life." 18 Eliz. I, ch. 3 (1575-76)

The statute went on to provide for punishment of mothers and "reputed Fathers" who abandoned their bastard children or refused to support them. It is noteworthy that 18 Eliz. I, ch. 3 presumed a duty on the part of both fathers and mothers to support their bastard children. The statute did not purport to create a new duty or relationship, but merely to force parents who did not perform their legal duty to maintain their bastard children to reimburse the State when it was obligated to perform their duty for them.

Moral language to the contrary not withstanding, the primary purpose of the legislation appears to be relief from the economic burden imposed on the parish by the maintenance of abandoned bastard children. The custody of such children was not particularly important and left to the discretion of the Justice ordering the payment. 18 Eliz. I, ch. 3 (1575-76).

The economic purpose of bastardy proceedings was reenforced by later amendments expanding the liability of the putative father to the State. The introduction to this amendment read as follows:

> "Whereas the Provisions of an Act made on the 18th year of the reign of Queen Elizabeth concerning Bastards begotten and born out of Lawful Matrimony, are found to be inadequate to the Purposes of indemnifying Parishes against the Charges and Expenses incurred by the apprehending and securing of the reputed Father, and also by the obtaining of the Order of Filiation, And whereas it is expedient that such charges and Expenses should be borne and discharged by the adjudged reputed Father of such Bastard Child or Children . . . ."
> 49 Geo. III, ch. 68 (1809)

The concept of *filius nullius* was clearly not preceived as a denial of the parent's duty to support his illegitimate children. In particular, it was no deterrant to the parish when it sought to recover the expense of maintaining abandoned children from their reputed father. Neither statute makes any mention of a possible inconsistency in recovering sup-

port payments from the parents of a "child of nobody" or even jailing them if they did not cooperate.

Blackstone, far from denying the existence of parental rights in a bastard, clearly recognized a natural tie between bastard children and their parents which gave rise to the duty of maintenance.

> "For, though bastards are not looked upon as children to any civil purpose, yet the ties of nature, of which maintenance is one, are not so easily dissolved and they hold indeed as to many other intentions; as, particularly, that a man shall not marry his bastard sister or daughter. The civil law, therefore, when it denied maintenance to bastards begotten under certain atrocious circumstances, was neither consonant to nature, nor reason; however profligate and wicked the parents might justly be esteemed." 1 Blackstone, *supra*, ch. 16, at 458

Blackstone saw the purpose of marriage and legitimacy in the modern sense as

> "being to ascertain and fix upon some certain person, to whom the care, the protection, the maintenance, and the education of the children should belong." *Id.* at 454

Roman law legitimation procedures were perceived as a mere fiction to obtain inheritance by legitimating adults; and Blackstone believed the English rule was better because it forced the parents to marry before the child was born, thereby providing for his maintenance during infancy. (*Id.* at 455) Obviously this is somewhat of an after the fact rationalization of the English lords' determination to keep the impractical ecclesiastical marriage law out of land tenure questions, but it does show an increased concern with the welfare and maintenance of bastard children.

However, when Blackstone recites the rule that bastards are *nullius filius*, he is careful to refer to inheritance matters only. He goes so far as to hedge over whether a bas-

tard should be described as having no line of ancestry at all or merely no "inheritable" ancestry.

> "Bastards are incapable of being heirs . . . are held to be *nullius filii* . . . Being thus the sons of nobody, they have no blood in them, at least no inheritable blood; consequently none of the blood of the first purchaser; and therefore, if there be no other claimant than such illegitimate children, the land shall escheat to the lord." 2 Blackstone, *Id.*, ch. 15, at 247.

The common law concepts of ancestry for inheritance purposes, parental rights for guardianship over property and the issue of custody of the child have been hopelessly confused by Modern observers. At English common law, the father had the sole rights of a parent over the property, of his legitimate children as well the testamentary right to appoint a guardian in place of a surviving mother. He also had the sole right to custody. (1 Blackstone, *supra*, at ch. 16) Because exclusive custody rights followed paternal descent and property guardianship rights in the case of legitimate children, modern writers have illogically assumed that because the putative father had no "parental rights" to guardianship over property or to testamentarilly provide for his children's guardianship, he also had no claim to custody. (See, *Rights of a Father Toward His Illegitimate Child in Illinois*, 46 Ill. L. Rev. 156 (1951)). Much of this misinterpretation arises from the tendency of Modern American writers to confuse the common law concept of guardianship as a pecuniary interest in the ward's estate with the Modern "guardianship of the person" which concerns itself with the welfare of the child. (For an example of the Modern concept of guardianship of the person see Ill. Rev. Stat. ch. 37, Sec. 701-11 (1969).

English caselaw, however, indicates that the question of custody at common law was considered independently of both the line of descent for inheritance purposes (*nullius filius*) and parental rights as expressed in property and testa-

mentary guardianships. For example, the mother of a bastard, although not considered a parent for purposes of inheritance or guardianship had a recognized "natural" right to custody.

> "In a reported case Maule, J . . . is to have asked whether the mother of an illegitimate child was anything but a stranger to it . . . the judge in making the observation must have been referring only to the strict legal rights as to guardianship. In many cases the law recognizes the right of a mother to the custody of her illegitimate child." *Queen v. Nash,* 10 Q.B. 454 (1883)

A number of decisions returned a bastard to its mother when removed by the father by force or deceit even though she was not considered a parent either. *Rex v. Soper,* 5 Term. R. 278 (1793); *Rex v. Hopkins,* 7 East 579 (1806). But where the father had custody of a bastard child fairly, the courts would *not* remove it on the grounds that he had no "parental rights" *Rex v. Moseley,* 5 East 224 note (1804?).

The earliest bastardy legislation governing the territory which later became Illinois was "An Act for the better securing the paiment of Levies, and restraint of vagrant and idle people; and for the more effectual discovery and prosecution of persons having bastard children; and for making better provisions for the poor." Hening; Va. Stat. 1727, ch. 7, at 212. The section relating to bastards exposed the mother to fine or corporal punishment for abandoning a bastard child. The distinguishing factor about this statute is that the bastardy provision follows a rather modern neglect provision which enables the court to certify children, whose parents

> "shall be adjudged incapable of supporting and bringing up such child . . . by reason of his, her or their idle, dissolute, and disorderly course of life or that they neglect to take due care of the education and instruction of such child or children, in christian principles . . ."

and give them to the churchwardens of the parish to bind out to service or apprentice.

Kent recognized a common law neglect action which, unlike its British equivalent, does not appear to require an estate or trust for the courts of equity to take jurisdiction. J. Kent, 2 Commentaries on American Law, pt. iv, Sec. 29, at 194 (2d ed., 1832). Kent flatly states that,

> "the rule that a bastard is *nullius filius*, applies only to the case of inheritance." *Id.* at 214.

He links the duty of the father to support his bastard child to his right to custody in the absence of objections from the mother.

> "The father of a bastard child is liable upon his implied contract, for its necessary maintenance, without any compulsory order being made upon him, provided he has adopted the child as his own, and an asquiesced in any particular disposition of it. The adoption must be voluntary, and with the consent of the mother, for the putative father has no legal right to the custody of a bastard child, in opposition to the claim of the mother . . . She has a right to the custody and control of it as against the putative father, and is bound to maintain it as its natural guardian, though, perhaps, the putative father might assert a right to the custody of the child as against a stranger." *Id.* at 215-216).

Kent perceived the custody of bastard children as an issue between the putative father and the natural mother. His statement about the father's liability for maintenance after voluntary adoption can be better understood in the context of state legislation like that of Illinois' 1827 Bastardy Act. It should also be remembered that American adoption proceedings in Kent's day were more in the nature of contractual arrangements between the parents and the adopting party than an action in the best interest of the child. (S. Breckinridge, The Family and the State, 358-361 (1932)) Illinois' Bastardy Act provided that a father's liability for

the maintenance of his illegitimate child was dependent on his right to take custody of the child if he so desired.

> "That said reputed father, after giving bond with approved security, to the court of probate in said county, conditioned for the suitable maintenance of any such child, for the term aforesaid, shall be permitted to take charge and have the control of his said child; and from the time of the said father taking charge of such child, or should the mother refuse to surrender the said child, when so demanded by the said father, then and from thenceforth the said father shall be released and discharged from the payment of all such sums or sums of money as may thereafter become due against the father, for the support, maintenance, and education of any such child." An Act to provide for the maintenance of Illegitimate Children, 1827, in Ill. Stat. Laws, 1839 at 332.

In 1845, Abraham Lincoln successfully defended a putative father who was attempting to relieve himself of his liability under the above statute by demanding custody of an illegitimate child with the full knowledge that the mother would refuse. The Illinois Supreme Court "reluctantly" allowed him to pursue this course of action with the warning that if the child was turned over to him he would

> "thereafter during [its] minority become bound for [its] maintenance, support, and education, in the same manner as though [it] had been born in lawful wedlock . . . the legislature did not intend that, when he had once so chosen to demand it of the mother, that his duties towards [it] should cease at the expiration of the period of seven years, the time limited in his bond for its support, and then be at liberty to thrust it forth upon the world's charity, friendless and unprotected." *Wright v. Bennett,* 7 Ill. 587 (1845).

This provision was later amended to restrict the father's right to demand custody of children under 10 years. Ill. Laws 1871-72, at 423, 426; Sec. 13. In addition, the Juve-

nile Court was authorized by a statute of 1899 to take jurisdiction over any child who is "destitute or homeless or abandoned or dependent upon the public for support" Ill. Laws 1899, at 131, 132. Dependent children as well as those who "whose home, by reason of neglect, cruelty or depravity on the part of its parents, guardian or other person in whose care it may be, is an unfit place for such a child" (Ill. Laws 1899, at 132) could be placed in a foster home or institution by the court regardless of the claims of their parents, legal or putative.

However, it was the custody provision of the Illinois Bastardy Act which led the General Assembly to pass legislation expressly prohibiting the putative father from taking custody except through an adoption proceeding, Ill. Laws 1949, at 344. In 1945 the rights of a putative father to custody of his bastard child were statutoraly defined as follows:

> "The reputed father of a bastard child shall not have the right to the custody or control of such child, if the mother is living and wishes to retain such custody and control, until after it shall have arrived at the age of ten years, unless, upon petition to the circuit court of the county in which the mother resides, it shall on full hearing of the facts in the case, after notice to the mother, be made to appear to the judge of said court that said mother is not a suitable person to have control and custody of such child." Ill. Rev. Stat., ch. 17, Sec. 13 (1945).

That year the Adoption statute was amended to omit any references to "illegitimate" or "born out of wedlock" from the adoption petition. At the same time, the petition was required to state the name of the parents and of "the person or organization having the legal custody of such child." Ill. Laws 1945, at 10, 15. An Attorney General's opinion (1946 Op. Ill. Att'y. Gen. 58) held that the adjudicated father's limited custody rights under the Bastardy Act entitled him to notice before the child could be adop-

ted. Further the Attorney General believed that "reputed father" as used in the Bastardy Act included all putative fathers whether they had been adjudicated under the statute or not. This meant that an illegitimate child could not be adopted until a guardian with power to consent to an adoption had been appointed.

At the next convenient legislative session in 1949, the Illinois General Assembly attempted to resolve the difficulty by eliminating the putative father's rights to custody by positive legislation. Ill. Laws 1949, at 344. Apparently the chilling effect of this legislation on putative fathers who were willing to take custody of their illegitimate children but who couldn't meet the rigid standards of a modern adoption proceeding was not considered. One commentator noted that Illinois was the only state which statutorily prohibited the putative father from obtaining custody save through an adoption proceeding. *Rights of a Father Toward His Illegitimate Child in Illinois,* 46 Ill. L. Rev. 156 (1951). He suggested that Illinois had "come the full circle back to the common law situation." *Id.* at 158

Such an evaluation overlooks the indifference of Ancient and Medieval law to the physical custody of children. It misinterprets the intent and effect of the concept of *nullius filius.* Finally, it fails to take into account the effect of the Modern Juvenile Court's jurisdiction over "dependent" and "neglected" children on the rights of the putative father. Far from returning to the common law situation, Illinois has reduced the putative father to a lower position than he had at common law. It has rejected the natural and biological ties between a child and his biological father; ties which have been, to some extent, recognized by the law ever since the time of Justinian.

APPENDIX III

RELEVANT STATUTES AND DECISIONS OF OTHER JURISDICTIONS

Few states have specifically considered the issue of whether the unwed father who has voluntarily acknowledged, supported and established a familial relationship with his children is accorded the status of a parent or the right to their custody and control upon the death of the mother.

Those states which by judicial decision and/or statute specifically define (in a context relevant to custody and control of children) the unwed father who has acknowledged, supported and established a familial relationship with his children as a "parent" before and including or after the mother's death are as follows:

Alabama:	Ala. Code, Title 34, § 89 (1958) (Desertion and Non-Support); *Law v. State*, 238 Ala. 428, 191 So. 803 (1939).
North Carolina:	N.C. Gen. Stat., § 49-15 (1969) (Bastardy Act).
Kansas:	Kan. Stat. Ann., § 38-802 (1964) (Juvenile Code).

Those states which by judicial decision and/or statute specifically exclude (in a context relevant to custody and control of children) the unwed father who has acknowledged, supported and established a familial relationship with his children from the definition of a "parent" are as follows:

Florida:	Fla. Stat. Ann., § 39.01 (1964) (Juvenile Courts); *Clements v. Banks*, 159 So.2d 892 (App. 1964).
Georgia:	Ga. Code Ann., § 74.203 (1964) (Parent and Child).

Illinois:	Ill. Rev. Stat., Ch. 37, § 701-14 (1969) (Juvenile Court Act).
North Dakota:	N.D. Cent. Code, § 32-36-35 (1960) (Illegitimacy).
South Dakota:	S.D. Compiled Laws Ann. § 25-8-46 (1967) (Paternity Proceedings)
Tennessee:	Tenn. Code Ann., § 36-236 (1970).
Wisconsin:	Wis. Stat., § 48.02 (1967) (Children's Codes)
Wyoming:	Wyo. Stat. Ann., § 14-53 (1957) (Termination of Parental Rights).

Those states which by judicial decision and/or statute specifically hold that the unwed father who has acknowledged, supported and established a familial relationship with his children has a superior right to the custody and control of the children, at least upon the death of the mother, are as follows:

Arizona:	Ariz. Rev. Stat. Ann., § 14-846 (1956) (Guardian and Ward); *Caruso v. Superior Court*, 100 Ariz. 167, 412 P.2d 463 (1966).
California:	*In re Guardianship of Smith*, 42 Cal.2d 91, 265 P.2d 888 (1954).
Louisiana:	The father has a right to the custody of "natural" children. Natural children are illegitimate children whose parents *could* have married at the time of conception and who have been acknowledged by their father. La. Civ. Code. Ann., Art. 202, 256 (West 1952).
Minnesota:	*In re Shady*, 264 Minn. 222, 118 N.W.2d 449 (1962); *In re Brennan*, 270 Minn. 455, 134 N.W.2d 126 (1965).

Mississippi:	*Aycock v. Hampton*, 84 Miss. 204, 36 So. 245 (1904).
New Jersey:	*In re Guardianship of C.*, 98 N.J. Super, 474, 237 A.2d 652 (1967).
North Carolina:	N.C. Gen. Stat., § 49-15 (1969) (Bastardy Act).
Ohio:	Ohio Rev. Code Ann., § 2105.18 (Baldwin 1964) (Illegitimate Children).
Pennsylvania:	*Commonwealth ex rel. Harper v. Fuller*, 142 Pa. Super. 98, 15 A.2d 518 (1940); *Commonwealth ex rel. Kevitch v. McCue*, 165 Pa. Super. 49, 67 A.2d 582 (1949).
Texas:	*Templeton v. Walker*, 179 S.W.2d 811 (Tex. Civ. App. 1944).
Utah:	*In re State in Interest of M.*, 476 P.2d 1013 (Utah S. Ct. 1970).
Washington:	Wash. Rev. Code, § 26.24.190 (1967) (Filiation Proceedings); *State ex rel. Smith v. Superior Court*, 23 Wash. 2d 357, 161 P. 2d 188 (1945); *Wade v. State*, 39 Wash. 2d 744, 238 P.2d 914 (1951).

Those states which by judicial decision and/or statute specifically hold that the unwed father who has acknowledged, supported and established a familial relationship with his children does *not* have a superior right to the custody and control of the children upon the death of the mother are as follows:

Florida:	*Clements v. Banks*, 159 So.2d 892, (App. 1964).
Georgia:	*Toole v. Gallion*, 221 Ga. 494, 144 S.E. 2d 360 (1965).

Illinois:	Ill. Rev. Stat., Ch. 106¾, § 62 (1969) (Paternity Act); *Stanley v. Illinois*, 45 Ill. 2d 132, 256 N.E. 2d 814 (1970).
Maryland:	*Butler v. Berry*, 210 Md. 332, 123 A.2d 453 (1956).
Wisconsin:	Wis. Stat. Ann., § 48.02 (1958) (Children's Code).

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970.

No. ~~5750~~ 70-5014

PETER STANLEY, SR.,

Appellant,

vs.

THE PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS.

BRIEF OF THE CHILD CARE ASSOCIATION OF ILLINOIS, INC., AMICUS CURIAE.

CALVIN SAWYIER,
One First National Plaza,
Chicago, Illinois 60670,
312 786-5600,

J. DONOVAN BIXLER,
RICHARD L. MANDEL,
Counsel for Child Care Association of Illinois, Inc., Amicus Curiae.

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INTEREST OF AMICUS CURIAE.

The Child Care Association of Illinois, Inc. ("Association") is an organization composed of individuals and of public and voluntary agencies concerned with child welfare in Illinois, including foster family placement and adoption programs.

The Association files this brief *amicus curiae,* with the consent of all parties, in support of the statutory scheme of custodial and adoption law relating to minors which exists in Illinois and under which many of the organizations which make up the membership of the Association operate on a daily basis.

From the beginnings of urban development in Illinois, both the State and voluntary not-for-profit organizations have concerned themselves with the care and custody of dependent and neglected children. The methods of charitable child care used have changed dramatically with the changes in society over the past years, particularly with the phenomenal surge in the adoption of children which came into full swing about a quarter century ago. Many children who formerly would have been permanent wards and occupants of an institution are now placed by the social agency with foster parents, who provide interim custodial care within an individual family setting, until the child can be matched with adoptive parents, who then become the legal parents of the child in every respect. There also remain several agencies which continue to operate institutional facilities for caring for the child pending its adoption.

Charitable adoption agencies who are members of the Association are licensed and qualified to be granted the legal custody of a dependent or neglected child with the right to place for adoption and thus have close contact with the administration of the laws pertinent to this case.

The complex of laws which make possible the present-day custodial and adoption system of child care could be inadvertently dealt a fatal blow by a decision in the instant case, concededly a hard case which should not make bad law. If the so-called "unwed father" is to be automatically accorded, next to the mother, rights tantamount to those held by her, including the right to consent to the custody and/or adoption of the child, then the whole legal system for the adoption of children, which has proved so beneficial to society as a whole, will be placed in serious jeopardy by the elements of delay and non-finality which will thereby be interjected into the underlying judicial process.

Therefore, the licensed social agencies in Illinois which specialize in child welfare and adoption, as well as the other organizations and professional persons who are members of the Association and whose general interest is in child welfare, have felt it essential that the Court be made aware of the broader context and impact of this case which might easily be overlooked by reference only to the particular facts here or to the rather elliptical opinion below of the Illinois Supreme Court.

QUESTION PRESENTED.

Is a system of child welfare laws relating to custody and adoption constitutional, which does not accord the natural father who has failed to legitimatize and assume legal responsibility for his child absolute preferential right to custody, after the mother, and the attendant right to consent to custody and/or adoption, but which provides full opportunity for the natural father who has had any known contact with or interest in the child to prove that the best interests of the child are served under the particular circumstances of the given case by granting him custody and the right to adopt?

STATEMENT OF THE CASE.

The facts of the case are adequately stated in the Petitioner's brief, but we believe that a condensed version of the Illinois statutory provisions particularly involved would be helpful to the Court. Therefore, we have made such an arrangement of the pertinent statutory language in Appendix I hereto, italicizing those phrases which are of particular relevance to the text of the Argument, *infra*.

ARGUMENT.

I.

THE ILLINOIS LAW, IN GRANTING CUSTODY AND THE RIGHT TO ADOPT, GIVES ADEQUATE RECOGNITION TO THE NATURAL FATHER WHO HAS ASSUMED DE FACTO RESPONSIBILITY FOR HIS ILLEGITIMATE CHILDREN, AND THE NATURAL FATHER IS GUARANTEED FULL HEARING IN CONNECTION THEREWITH, IF HE SO DESIRES. THIS SATISFIES THE REQUIREMENTS OF DUE PROCESS.

The Illinois statutory scheme fully satisfies due process, which we believe to be the only real constitutional issue present here—since the classification between fathers who have and who have not assumed legal responsibility for their children is, insofar as equal protection is concerned, a patently reasonable one. (Point II, *infra.*) See *Labine* v. *Vincent,* decided 3/29/71, 39 U. S. Law Week (Sup. Ct.) 4344, 4346, where this Court also said:

> "The power to make rules to establish, protect, and strengthen family life . . . is committed by the Constitution of the United States and the People of Louisiana to the legislature of that state."

The Illinois statutes afford petitioner a meaningful opportunity to be heard in connection with the status of his basic family relationships and are, in all events, valid as a whole even if it were to be conceded—which is not the case—that they might be invalid in their application to this particular petitioner. *Boddie* v. *Connecticut,* decided 3/2/71, 39 U. S. Law Week (Sup. Ct.) 4294, 4295, 4296.

The pertinent statutory complex gives the right to custody of the illegitimate child to the mother during her life, unless she so neglects the child as to be deemed unfit. Upon

the cessation of her custody, the Illinois law allows the natural father, the State, or any other person, whether related to the child or not, to file a petition and be heard on the question of who shall have custody of the child. If the natural father has in the past assumed sufficient familial responsibility and is aware of the situation, he will certainly file a petition, particularly if someone is attempting to remove the child from him. This would be true not only of the natural father, but any other non-related person who has had long custodial ties to a child, whether it be a step-parent or good friend. The natural father is placed, under such circumstances, in the first category of mention for the award of custody, and his position is further fortified by the provision which requires that the wishes of the child be given appropriate weight and consideration. The natural father, given custody under an order also granting the right to consent to adoption by himself, can then, with no further investigation required by law, legitimatize his children by an adoption proceeding which is strictly confidential and which also results in the substitution of a new birth certificate of public record for the child.*

Petitioner, having a most appealing (and unusual) set of facts, seeks to impugn the reasonableness and even-handedness of the above statutory scheme by simply assuming that in practice the law will be administered adversely to him at every turn. This is entirely unwarranted speculation, and the chances are overwhelming that the long-standing familial relationship with his illegitimate children which Mr. Stanley has nurtured will be sedulously preserved by the Juvenile Court, not broken up in the senseless fashion which petitioner would have one believe characterizes the judicial administration of the Illinois child welfare laws. Any seeming preliminary hesitation

* Single person adoptions have increasingly been encouraged by the social agencies and the courts in recent years.

on the part of the Juvenile Court in reaching this result in the present case must have reflected the existence of factors other than purely legal or economic ones which are not apparent on the face of the record as it presently stands.

Nor would any responsible agency seek any different result, for who would want to try to adopt children out of the kind of family situation which petitioner's counsel postulates as existing in this particular case? No social worker would seek to break up a family complex such as petitioner presents here and, for children of essentially unadoptable age, seek foster parents other than those the natural father had already resorted to on his own initiative. Any other result of the court proceedings would, indeed, be reversible error. The only possible open question in the entire above complex of laws has now been settled by the opinion below: The exclusion of the natural father from custody, under Section 12 of the Paternity Act, is not only limited to a situation where the mother is alive and files suit for support (for only she can institute the complaint making the charges or allegations required before that section is operative) but, also, it proscribes only that claim to custody which is made simply on the basis that custody is a necessary concomitant to the paying of child support. (App. 32-3.)

Thus what petitioner argues here is not constitutional fault in the Illinois law, but simply presumed error in its application by the Juvenile Court. (*Gryger* v. *Burke*, 334 U. S. 728, 731; *American Express Co.* v. *Kentucky*, 273 U. S. 269, 273; *Central Land Co.* v. *Laidley*, 159 U. S. 103, 112. Cf. *Evans* v. *Abney*, 396 U. S. 435, 444, 446-7.)

There is a suggestion that because of the potential cost and effort to the natural father the Illinois law does not in fact provide him with a meaningful opportunity to utilize its provisions. It should be noted here that economic

status is in no sense a required statutory consideration in awarding custody in the first instance;* it is, moreover, specifically excluded from any consideration in taking away custody from the mother or from the natural father once he has been made legal guardian. In the Juvenile Court proceedings counsel will be appointed for the natural father if he so requests because of financial inability. Legal Aid and other organizations providing legal services to the poor handle Juvenile Court cases (as witness the instant case) and adoptions for those who cannot afford private counsel. As for court costs, which is a general problem not particularly associated with the matters at issue here, in cases of true indigency these can be waived. The General Rules of Practice of the Circuit Court of Cook County so provide, Rule 8.1. (See also, *Boddie* v. *Connecticut, supra.*) If petitioner does not qualify as indigent, he can consider that these costs are in lieu of the marriage license fees which he saved himself in failing to legitimatize his children the simple and direct way prior to the mother's death.

---

* The Illinois Department of Children and Family Services is now expressly authorized by statute to subsidize certain adoptive families in order to ease economic deterrents to the adoption of hard to place children. Illinois Revised Statutes, Chapter 23, "Charities," Section 5005 (Public Act 76-1683, Act of August 16, 1968).

II.

IT IS NOT UNFAIR OR DISCRIMINATORY IN ANY CONSTITUTIONAL SENSE NOT TO ACCORD AN ABSOLUTE RIGHT TO CUSTODY, AFTER THE MOTHER, TO ANY NATURAL FATHER WHO HAS FAILED TO LEGITIMATIZE HIS CHILDREN AND THUS ASSUME ANY LEGAL RESPONSIBILITY FOR THEM.

If we assume here that the petitioner in this particular case is, in the words of his counsel, a "good, suitable, interested unwed father", whose concern, past and present, makes him "readily identifiable" as a proper party to any custody or adoption proceedings, then the State court will certainly recognize any initiative petitioner may take in respect to the custody of the children. Those same facts also give him, as we have seen, the undoubted ability to establish in such judicial proceedings his claim to the custody of his children and, should he finally deign to legitimatize them and to assume the entire legal responsibility for them, his right to adopt them.

But this is not enough for petitioner. His argument is that it is constitutionally necessary for Illinois law *either* (1) to declare that biological status *per se* gives all "unwed fathers" (for all such, responsible or not, have the same biological relationship) an automatic right to custody, next to the mother; *or* (2), failing that, at least to establish by general legislative act (rather than determine by particular judicial decision) the criteria of a "responsible" unwed father* and to accord to such persons an automatic right to custody, without more, after the mother.

Such an absolute right to custody in the natural father would impinge seriously on important State public policy

* We prefer the term "natural father", since a substantial number of "unwed fathers" are married (to women other than the mother of their illegitimate children).

in the child welfare field and is not required, as against these strong State interests, by either constitutional or "natural" law, so long as the natural father who has real concern for his illegitimate child is accorded—as he is in Illinois—a meaningful opportunity to translate this concern into a responsible legal relationship of custody and/or legitimatization by adoption.

In the first place, there is nothing invidious or unfair about treating as a "legal stranger" to his child, to use petitioner's phrase, every natural father who has failed, wilfully or not, to legitimatize his children during the lifetime of the mother. Every such natural father *is* a legal stranger to his child because he has assumed no legal responsibility toward the child. If proceedings under the Paternity Act have to be brought by the mother in order to force at least some financial responsibility from the natural father, the latter is hardly the interested, concerned person on whom petitioner builds his argument. Moreover, once the mother brings such an action, the entire question of the child's custody is opened up under the criteria of the Juvenile Court Act which, as we have seen, permits the natural father to establish his claim to the legal relationship of custody, except only that he cannot take custody from the mother if the only factor against her is her financial circumstances and that he cannot establish any right to custody in himself simply from the fact that a claim to support the child has been asserted against him in court.

A legitimate child is, by definition, one to whom there is a lawful, binding relationship. As long as a natural father has assumed no responsible legal relationship because of his own fault, that is, because disabled by his own initial situation (himself married and/or the woman he has relations with married) or by his own refusal to act (to marry the mother or, if sued by her for Paternity Act support, to claim custody), there can be nothing wrong in

the law treating him as just what he has made himself—one who has no absolute *per se* legal relationship with the child. *Labine* v. *Vincent,* decided 3/29/71, 39 U. S. Law Week (Sup. Ct.) 4344, 4346. The discriminatory disadvantage claimed in the case at bar is to the natural father. We are not dealing with a situation where the illegitimate child, as such, is the person discriminated against, even though powerless to have prevented or to remedy his or her disadvantaged situation. Cf. *Labine* v. *Vincent,* 39 U. S. Law Week, at p. 4352 (dissenting opinion).*

There is, after all, a legitimate public interest in the institution of marriage and in the rearing of children within the legally-binding family unit. And there is also a legitimate State interest in encouraging the removal from helpless children of the stigma of illegitimacy which, if nothing else, confronts them each time there is a call for their birth certificate.

Secondly, the past public experience upon which the Illinois legislation is based is, beyond peradventure, that the vast majority of natural fathers are not only disinterested in their illegitimate offspring but, in fact, affirmatively try to avoid any "involvement" in the birth and rearing of the child. That this is the universal experience is attested to by the time-honored existence of paternity suits in every jurisdiction.

The general inability to identify or locate the putative father, and the possibility that some person who was not served with notice of judicial proceedings and who claims to be the father will show up at some subsequent time,

* Nor is the claim made here of an unlawful discrimination between the natural parents (as members of the basic class of persons having the same biological relationship to the child) because the mother is given priority in custody and the natural father can assume familial responsibility only at her discretion. The natural father has no rights while the mother is alive and has custody, so that no rights are taken away from him upon the mother's death—as some of petitioner's arguments might seem to imply.

make it imperative that the natural father not be accorded any absolute right to custody or to consent to the awarding of the custody or the adoption of the child. The uncertainties here are manifest and pervasive, and the possibilities —from *bona fide* custody fights rending the child's life asunder to out-and-out extortion—are so alarming as to have a seriously chilling effect on the now highly important social process of adopting children. This is much more than a question of "administrative convenience". The welfare of the neglected or dependent child demands not only expedition in placing the child in a stable family situation but also finality in the adoptive placement, once made. (See, *e.g.*, page 42 of Brief for the Petitioner.) Indeed, the need for a shorter cut-off date even for the mother to contest her consent to adoption is sparking legislation to this effect in several of the States where adoption is a major tool of child welfare administration.

It is thus quite erroneous, we submit, to suggest that the biological relationship of father constitutionally requires that natural fathers as a class be given an absolute right to custody—either equal to or second in the line of consent, so to speak, to the mother, in view of the devastating effect this would have on the entire public policy behind the adoption laws.

The exceptional unwed father, such as petitioner, is either known or will make himself known so that he is accorded a full opportunity for judicial determination of his natural, compelling claim to custody, which, as we have seen, the Illinois legislation leaves open to such a person. To require more legal recognition than this to the class of natural fathers who have failed to legitimatize their children accords with no principle of constitutional, natural or moral law and violates the dictates of history, important public policy and common sense. The standard must be

the welfare of the child in each individual case, and the determination of this—including any factors indicating that the natural father is appropriately "responsible" to be awarded custody—is surely best made by judicial decision. Legislation establishing the criteria for a "responsible" natural father is thus not only constitutionally uncalled for, but is likely to impart standardized restrictions which the judicial process alone can avoid.

Illinois has a carefully worked-out procedure for promoting the welfare of children by orderly custody and adoption proceedings which provide a genuine opportunity for the special claim of the natural father to be accorded due recognition. Any additional grant of automatic or absolute custodial rights to the natural father will introduce an element of uncertainty which we believe will cripple, if not kill, the entire State system of child welfare laws as developed to date.

CONCLUSION.

For the foregoing reasons it is urged that in deciding this case this Court should be careful to preserve to the State of Illinois its essential legislative scheme for child welfare, as the operation of that legislation is outlined hereinabove in this Brief.

Respectfully submitted,

CALVIN SAWYIER,
One First National Plaza,
Chicago, Illinois 60670,
312 786-5600,

J. DONOVAN BIXLER,
RICHARD L. MANDEL,
Counsel for Child Care Association of Illinois, Inc., Amicus Curiae.

APPENDIX I.

CONDENSED VERSION OF ILLINOIS STATUTORY PROVISIONS INVOLVED HEREIN.

Illegitimacy.

". . . All marriages commonly known as 'common law marriages' entered into after June 30, 1905 are null and void . . . And *any children* born to parties who have entered in to such common law marriage *shall be and are deemed legitimate upon the parents having obtained a license to marry and are married* in the manner provided in this Act." (Illinois Revised Statutes, Chapter 89, "Marriage", Section 4; Act of 1905.)

"The intestate real and personal estate of a resident decedent who was illegitimate at the time of death . . . descends and shall be distributed as follows: [to spouse and/or children; if none, to mother and/or her descendants; if none, to maternal grandparents and/or their descendants; if none, to the nearest kindred of the mother; if none, the property escheats].

An illegitimate is heir of his mother and any maternal ancestor, and of any person from whom his mother might have inherited if living. And the lawful issue of an illegitimate person shall represent such person and take, by descent, any estate which the parent would have taken, if living. An illegitimate child whose patents intermarry and who is acknowledged by the father as the father's child shall be considered legitimate." (Illinois Revised Statutes, Chapter 3, "Administration of Estates", § 12; Act of 1872.)

Paternity.

"A proceeding to establish the paternity of a child born out of wedlock and to establish and enforce liability for its support, maintenance, education and welfare *shall be instituted in the circuit court . . . only on the filing of a complaint in writing by the mother of a child* born out of wedlock or by a woman who is pregnant with child, which, if born alive, may be born out of wedlock, accusing under oath or affirmation, a person with being the father of such child." (Illinois Revised Statutes, Chapter 106¾, "Paternity", § 51; Act of 1872, as amended.)

"Upon the filing of a complaint under this Act, the child involved therein shall be considered a 'dependent minor' within the meaning of Section 2-5 of the 'Juvenile Court Act'* . . .

"*The court may in such action* to determine paternity and liability for support *provide for the guardianship of the child in the mother or in any other person or institution as authorized by that Act.*" (Ill. Rev. Stats., Ch. 106¾, § 61; Act of July 5, 1957.)

"*A person charged or alleged to be the father* of a child born out of wedlock, whether or not adjudicated the father under this Act, shall have no right to the custody or control of the child except such custody as may be granted pursuant to an adoption proceeding initiated by him for that purpose."** (Illinois Revised Statutes, Ch. 106¾, § 62; Act of July 5, 1957.)

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* Ill. Rev. Stats., Ch. 37, § 702-5. See *infra*.

** Between 1872 and 1949 the putative father was stated not to have the right to custody or control of a child under 10 years of age, "if the mother is living and wishes to retain such custody and control", unless the father proved, in a suit to which the mother was a party, "that said mother is not a suitable person . . ."

Between 1949 and 1957 this section simply provided that "The reputed father of a bastard child have no right to the custody or control of such child."

Dependent or Neglected Child.

"... When any child . . ., under the age of one year, shall be wilfully abandoned by its parents and shall be taken and cared for by any charitable institution in this state . . . such parents . . . shall thenceforth lose all their right, control and authority over said child . . . [which] shall thereupon become vested in said institution . . .

In case of illegitimate children . . . an abandonment by the mother of any such child shall be deemed an abandonment by its parents, according to the provisions of this act." (Illinois Revised Statutes, Ch. 58, "Foundlings", §§ 1, 3; Act of March 7, 1872.)

"This Act shall be known . . . as the Juvenile Court Act."

"The purpose of this Act is to secure for each minor subject hereto such care and guidance . . . as will serve the moral, emotional, mental and physical welfare of the minor and the best interests of the community . . . In all proceedings under this Act the court may direct the course thereof so as promptly . . . to gather information bearing upon the current condition and future welfare of persons subject to this Act. This Act shall be administered in a spirit of humane concern . . . [and] shall be liberally construed to carry out the foregoing purpose and policy". (Illinois Revised Statutes, Chapter 37, "Courts", Sections 1 and 2; Act of August 5, 1965.)

" 'Agency' means a public or private child care facility legally authorized or licensed by this State for placement or institutional care or for both placement and institutional care . . .

" 'Parents' means the father and mother of a legitimate child, or the survivor of them, or the natural mother of an illegitimate child, and includes any adoptive parent. It

does not include a parent whose rights in respect of the minor have been terminated in any manner provided by law." (Ill. Rev. Stats., Ch. 37, §§ 701-6, 701-14.)

"Except as provided in this Section and paragraph (2) of Section 5-1, the minor who is the subject of the proceeding and his parents, guardian, legal custodian *or responsible relative* who are parties respondent have the right to be present, to be heard, to present evidence material to the proceedings, to cross-examine witnesses, to examine pertinent court files and records and also, although proceedings under this Act are not intended to be adversary in character, the right to be represented by counsel. *At the request of any party financially unable to employ counsel, the Court shall appoint counsel.*" (Ill. Rev. Stats., Ch. 37, § 701-20.)

"Those who are dependent include any minor under 18 years of age (a) who is without a parent, guardian or custodian . . .". (Ill. Rev. Stats., Ch. 37, § 702-5(1).)

"(1) If the court finds the parents, *guardian or legal custodian* of a minor adjudged a ward of the court are unfit or are unable, *for some reason other than financial circumstances alone,* to care for, protect, train, discipline the minor or are unwilling to do so, and that it is in the best interests of the minor to take him from the custody of his parents, *guardian or custodian,* the court may

(a) place him in the custody of *a suitable relative or other person;*

(b) [under the guardianship of a probation officer);

(c) [to an agency for care or placement];

(d) [to some licensed training school]; . . .

(f) [to the State Department of Children and Family Services].

(2) When making such placement, the Court, whenever possible, shall select a person holding the same religious belief as that of the minor . . . whenever alternative plans for placement are available, *the court shall ascertain and consider, to the extent appropriate in the particular case, the views and preferences of the minor.*

(3) When a minor is placed with a *suitable relative* or other person, *the court shall appoint him the legal custodian or guardian* of the person of the minor . . .". (Ill. Rev. Stats., Ch. 37, § 705-7.)

"The Court *may* require any legal custodian or guardian of the person appointed under this Act to report periodically to the court . . .". (Ill. Rev. Stats., Ch. 37, § 705-8.)

". . . The court . . . *may empower the guardian of the person of the minor, in the order appointing him as such guardian,* to appear in court where any proceedings for the adoption of the minor may at any time be pending and *to consent to the adoption.*" (Ill. Rev. Stats., Ch. 37, § 705-9(2).)

Adoption.

" *Such investigation* [of the background and suitability of the pending adoption] *shall not be made* when the petition seeks to adopt *a related child* or an adult unless the court, in its discretion, shall so order." (Illinois Revised Statutes, Chapter 4, "Adoption", Section 9.1-6; Act of July 17, 1959.)

". . . Where consents are required in the case of an adoption of a child, the consents of the following persons shall be sufficient:

(a) The parents; or

(b) *The legal guardian of the person of the child,* if there is no surviving parent.

* * * * *

The consent shall not be required from the father of an illegitimate child, nor shall the consent of the father of an illegitimate child be required after marriage of the father to the mother of an illegitimate child, where consent to the adoption has been given by the mother prior to the marriage, nor shall consent be required from the father of an illegitimate child notwithstanding that the father of such child has been ordered to support such child in accordance with the provisions of the Paternity Act."* (Ill. Rev. Stats., Ch. 4, § 9.1-8.)

"The word 'illegitimate' or the words 'born out of wedlock', or words imparting such meaning shall not be used in any adoption proceeding in any respect.

Upon motion of any party to an adoption proceeding *the court shall,* or upon the court's own motion the court may, *order that the file relating to such proceeding shall be impounded . . .*" (Ill. Rev. Stats., Ch. 4, § 9.1-18.)

"No attack upon or proceeding contesting the validity of an adoption decree heretofore entered shall be made either directly or collaterally because of the failure to serve notice on or to give notice to the reputed father, unless such attack or proceedings shall be instituted within one year after the effective date of this Act." (Illinois Revised Statutes, Ch. 4, § 10-1; Act of August 3, 1949.)

"(1) For a person born in this State, the State Registrar of Vital Records *shall establish a new certificate of birth* when he receives any of the following:

(a) *a certificate of adoption . . . or a certified copy of the decree of adoption . . .*

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* This last paragraph was a specific addition made in the new Adoption Act of 1959.

(2) When a new certificate of birth is established, . . . it shall be substituted for the original certificate of birth . . . [and] . . .

(4) . . . all copies of the original certificate of birth shall be sealed from inspection." (Illinois Revised Statutes, Chapter 111½, "Public Health"; § 73-17; Vital Records Act of August 8, 1961.)

Poor Persons.

"8.1 Application for Leave to Proceed as a Poor Person.

(a) Contents. An application for leave to sue or defend as a poor person shall be in writing and supported by the affidavit of the applicant or, if the applicant is a minor or an incompetent, by the affidavit of some other person having knowledge of the facts, stating:

(i) the applicant's occupation or means of subsistence;

(ii) the applicant's income for the year preceding the application;

(iii) the source and amount of any income expected by the applicant;

(iv) the nature and value of any property, real or personal, owned by the applicant;

(v) the particulars of all applications for leave to sue or defend as a poor person made by the applicant or on his behalf during the year preceding the application;

(vi) that the applicant is unable to pay the costs of the suit; and

(vii) that the applicant has a meritorious claim or defense.

(b) Ruling. If the application is denied, the court shall endorse the fact of denial on the application. *If the application is granted, the court shall enter an order allowing the applicant to sue or defend as a poor person.*"

(Rules of the Circuit Court of Cook County, Illinois).

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. ~~5700~~ 70-5014

PETER STANLEY, SR.,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

On Writ Of Certiorari To The Supreme Court Of Illinois

BRIEF FOR RESPONDENT

WILLIAM J. SCOTT,
Attorney General,
State of Illinois,

JOEL M. FLAUM,
First Assistant Attorney General,

MORTON E. FRIEDMAN,
Assistant Attorney General,
188 West Randolph Street (Suite 2300),
Chicago, Illinois 60601 (312-793-2570),

Attorneys for Respondent.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 5750

PETER STANLEY, SR.,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

On Writ Of Certiorari To The Supreme Court Of Illinois

BRIEF FOR RESPONDENT

OPINION BELOW

The opinion of the Supreme Court of Illinois is reported at 45 Ill. 2d 132, 256 N.E. 2d 814 (1970).

JURISDICTIONAL STATEMENT

The jurisdiction of this Court to review the judgment of the Supreme Court of Illinois is denied.

The appointment of a guardian by the Circuit Court of Cook County, Illinois, Juvenile Division, is not a final order,[1] did not affect a change in the custody of the children here involved,[2] and was but the commencement of proceedings by which the legal and custodial rights to the children were to be determined.

In the trial court, the sole issue was whether the petitioner was a parent as defined by state statute. Petitioner never asserted however, that such a definition was constitutionally infirm under the equal protection clause. The trial judge held that Stanley is not a legally responsible parent entitled to the custody and control of the children under Illinois law.[3] Petitioner has consistently refused to accept the responsibilities of parenthood by his failure either to legitimate the children while their mother was alive or to adopt them. Therefore, he has no custodial rights.

The Supreme Court upheld this decision and properly refused to consider petitioner's untimely constitutional argument.[4] The order entered by the trial court appoint-

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1. Ill. Rev. Stat., 1969, Ch. 37, § 705-8.

2. The children were placed by petitioner with the persons the court appointed as guardians.

3. Ill. Rev. Stat., 1969, Ch. 37, § 701-14.

4. The Supreme Court of Illinois, in its opinion in this case stated that Stanley had no standing to raise the equal protection issue since he had not been precluded from obtaining custody of the children. Should he choose to follow the proper procedure as provided by statute (Ill. Rev. Stat. 1969, Ch. 4), he might obtain custody. Of course, this result cannot be assumed on the record here since there has been no inquiry into Stanley's fitness and ability to act as a parent. This determi-

ing a guardian is subject to modification at any time. The petitioner has not been precluded from obtaining the custody of these children. However, this decision as to custody quite properly has been postponed until the petitioner is willing to accept legal responsibility for the children as well.[5]

This Court is without jurisdiction to review a non-final state court order upon federal constitutional grounds which were improperly raised and left undecided by the state court below.

CONSTITUTIONAL PROVISION

Section one of the fourteenth amendment to the Constitution of the United States:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without the due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

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nation is only possible after a hearing in which testimony is heard and evidence taken, and in which the primary focus is the ultimate welfare of the children, not of petitioner Stanley.

5. A. 29, 30.

STATUTORY PROVISIONS*

Illinois Revised Statutes, 1969, Chapter 3 (Administration of Estates

Section 12-8 (2nd paragraph) (illegitimates)
1969 State Bar Association Edition, Vol. 1, 37.

Illinois Revised Statutes, 1969, Chapter 4 (Adoption)

Section 9:1-1 (definitions)
1969 State Bar Association Edition, Vol. 1, 86-7.

Illinois Revised Statutes, 1969, Chapter 37, (Juvenile Court Act)

Section 701-11 (guardianship)
1969 State Bar Association Edition, Vol. 1, 1562.

Section 701-12 (legal custody)
1969 State Bar Association Edition, Vol. 1, 1562.

Section 701-14 (parents)
1969 State Bar Association Edition, Vol. 1, 1562.

Section 702-4(1) (neglected minor)
1969 State Bar Association Edition, Vol. 1, 1563.

Section 702-5(1) (dependent minor)
1969 State Bar Association Edition, Vol. 1, 1563-4.

Section 705-2 (dispositional orders)
1969 State Bar Association Edition, Vol. 1, 1563.

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*The statutes are set forth verbatim in **Appendix A**, infra, p. 35.

Section 705-7 (placement, legal custody, or guardianship)
1969 State Bar Association Edition, Vol. 1, 1569.

Section 705-8 (change of custody)
1969 State Bar Association Edition, Vol. 1, 1570.

Section 705-9 (power of guardian to consent to adoption)
1969 State Bar Association Edition, Vol. 1, 1570.

Illinois Revised Statutes, 1969, Chapter 89, (Marriage)
Section 4 (effect of marriage)
1969 State Bar Association Edition, Vol. 2, 573

Illinois Revised Statutes, 1969, Chapter 106¾ (Paternity)
Section 51 (definitions)
1969 State Bar Association Edition, Vol. 2, 1291.

Section 52 (liability of father and mother to child)
1969 State Bar Association Edition, Vol. 2, 1292.

Section 59 (judgment-retention of jurisdiction)
1969 State Bar Association Edition, Vol. 2, 1293.

Section 62 (custody of child)
1969 State Bar Association Edition, Vol. 2, 1294.

Illinois Revised Statutes, 1969, Chapter 111½, (Public Health)
Section 73-17 (new certificate of birth)
1969 State Bar Association Edition, Vol. 2, 1759-60.

QUESTION PRESENTED

Whether the legislative scheme adopted by Illinois to ensure the welfare and protection of children born out of wedlock violates the constitutional equal protection guarantee?

STATEMENT OF THE CASE

Petitioner Peter Stanley placed Peter Stanley, Jr., two and one-half years old and Kimberly Stanley, one and one-half years old in the home of Mr. and Mrs. Richard Ness. (A. 18, 22). The children were living with the Nesses on April 1, 1969, when a neglect petition was filed with the Circuit Court of Cook County, Juvenile Division. The petition alleged Peter Stanley to be the father of the children. (A. 2). Lucille Glenn, a probation officer, was unable to determine the whereabouts of Peter Stanley, Sr. and Mr. and Mrs. Ness were appointed temporary guardians of the children (A. 10). On April 15, 1969, Peter Stanley appeared with counsel. After a conference with Peter Stanley's attorney (A. 11), the State moved for leave to amend the Neglect Petition to a Dependency Petition because Peter and Joan Stanley (the children's mother) never married (A. 14). Without objection, leave was granted although the petition was never formally amended on its face. On May 6, 1969, the parties again appeared in the Juvenile Court. Peter Stanley, by his counsel, expressed his interest in continuing to receive the Social Security benefits due Peter Jr. and Kimberly Stanley. No question of custody was raised (A. 14).

On May 6, 1969 an order of dependency was entered. Mr. and Mrs. Ness accepted appointment as guardians (A. 23) and the Nesses were given leave to receive and disburse social security funds on behalf of the children (A. 23-24).[6]

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6. Subsequent to the application by petitioner for a writ of certiorari, conflict between the Ness family and petitioner resulted in a transfer of the children to another home. The motion of the State of Illinois for appointment of a guardian with power to consent to an adoption has been held in abeyance by the Juvenile Court pending the outcome of this case.

On May 16, 1969, petitioner's counsel, who previously had represented Karen Stanley, an older daughter, in a dispute between her and Peter Stanley (A. 11, 28), entered the case on behalf of Peter Stanley (A. 26), and filed a motion to vacate the order of May 6, 1969 (A. 30). The motion was continued to May 19, 1969, and denied that date. Whereupon, Peter Stanley appealed (A. 8) to the Supreme Court of Illinois. On March 24, 1970, the Supreme Court of Illinois affirmed the judgment of the trial court (A. 33). This Court granted the writ of certiorari herein on January 25, 1971 (A. 35).[7]

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7. Throughout his brief, petitioner suggests his prior care, alleged paternity, interest and family continuity of eighteen years in support of his petition. These matters were not relevant to the inquiry under a Dependency Petition. The sole factual question in the trial court was whether Peter Stanley was the legal father of the children as defined by statute. The State had no need then, nor does it now, to rebut petitioner's factual claims, some of which are unsubstantiated by the record.

SUMMARY OF ARGUMENT

Every society strives to guard its children from abuse and neglect, for it is only through them that a state or nation can perpetuate itself. Their welfare is the most compelling interest a government may have.

To meet this compelling challenge, Illinois has promulgated a comprehensive legislative plan which affects all children in need of protection from abuse, neglect or abandonment. This plan reaches children whose parents are married to each other as well as those who are legally defined as illegitimate. The sole factor which determines whether the State shall intervene in the upbringing of a child under this statutory scheme is whether the welfare of a child requires some action by the State.

Under this statutory pattern, a "parent" is defined as the mother or father of a legitimate child and the mother of an illegitimate child. The facts of this case present the issue of whether the natural father should have an automatic right to the legal control of an illegitimate child upon the mother's death. The absence of any legal responsibility for the child and the general disinterest of putative fathers in their illegitimate children makes apparent the futility of giving these fathers an automatic right to custody or legal control. Such a procedure conferring custody or control without legal or moral responsibility would be in derogation of the welfare of children.

Petitioner was not deprived of the custody of his natural children by this statutory plan. Petitioner could have legitimated the children by marriage, he still may by adoption. Through either procedure, a putative father may secure the rights of a parent. The State only re-

quires that he assume legal responsibility for the children as well. This requirement, imposed upon all mothers and upon married fathers is reasonable and in the best interests of innocent children, born in or out of wedlock. By considering only the best interests of the objective of the classification—children—the statutory scheme here questioned necessarily protects the interests of natural parents insofar as those interests do not conflict with the welfare of children.

ARGUMENT

THE ILLINOIS STATUTORY SCHEME ESTABLISHING PARENTAL RIGHTS AND RESPONSIBILITIES WHICH DEFINES THE TERM "PARENT" TO EXCLUDE THE PUTATIVE FATHER OF AN ILLEGITIMATE CHILD IS A REASONABLE MEANS OF PROTECTING THE WELFARE OF CHILDREN SUBJECT TO ITS PROVISIONS AND IS NOT VIOLATIVE OF THE EQUAL PROTECTION GUARANTEE.

This case assumes that petitioner Peter Stanley is the natural father of Kimberly and Peter Stanley, Jr., two minor children whose natural mother is deceased. As the natural father, the petitioner claims that he is entitled as a matter of right to the automatic custody and control of these children upon their mother's death. He argues that the Illinois statutory scheme which imposes both rights and responsibilities upon parents of children violates the equal protection guarantee of the fourteenth amendment by defining the term "parent" as the father or mother of a legitimate child or the mother of an illegitimate child. This definition excludes him from the automatic assumption of parental rights (custody) as well as parental responsibilities. It requires that he subject himself to the scrutiny of a court in a proceeding focusing upon the issue of the welfare of the children in question before a factual determination may be made compelling the legal determination of certain parental rights i.e. custody. Since fathers of legitimate children and mothers of children born out of wedlock are not required to subject themselves to this factual determination of fitness before they are entitled to parental rights, petitioner Stan-

ley asserts that the Illinois definition of parent unreasonably discriminates against fathers of illegitimate children.

Respondent will show that the comprehensive plan established by the Illinois legislature to protect all children during their formative years from neglect and abuse is a reasonable means of fulfilling a legitimate and necessary governmental objective. This plan, which does exclude illegitimate fathers from the definition of "parent," suffers from no constitutional infirmity. We will focus in particular upon the statutory scheme as it affects illegitimate children.

At common law the child born out of wedlock was nullius filius, the son of no one. *Brewer* v. *Blougher*, 14 Pet. 178, 198 (1840). Neither his mother nor his father had a right to custody. The custody of the child born out of wedlock was in the parish where he was born. 1 Blackstone's Commentaries 459 (Jones ed. 1915); *Horner* v. *Horner*, 161 Eng. Rep. 573, 578 (Ch. 1799). No person had an obligation to support the illegitimate until 1575 when both parents were made criminally accountable for making the child a public charge. 18 Elizabeth c. 3.[8] This was the law in the Northwest Territories prior to the formation of Illinois as a State. *McCool* v. *Smith*, 66 U.S. 459 (1861); Dominik Lasok, "Virginia Bastardy

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8. Petitioner's statement (Pet. Br. 74) that under this statute a decision as to custody was left to the discretion of the parish judges is not supported by a reading of that statute. Petitioner is perhaps confused by Section 7 of the Poor Law Amendment Act of 1844 which provided that on the death of the mother, custody was to be determined by the local judges. 2 Hallisbury's Statutes (2nd) 471-2; 7 & 8 Vic. c. 101, § 7.

Laws; A Burdensome Heritage," 9 *Wm. & Mary L. Rev.* 402, 407 (1967). Except as modified by statute, the common law of England through March 23, 1607, is the law of Illinois. Ill. Rev. Stat., 1969, Ch. 28, § 1; *Cope* v. *Cope,* 137 U.S. 682 (1891).[9]

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9. In a totally spurious analysis of the English precedents, based in part on out-of-context quotations, petitioner has attempted to suggest that at common law a putative father had custodial rights in his child. He had none, not even upon the death of the child's mother. Horner v. Horner, 161 Eng. Rep. 573, 579 (Ch., 1799).

Rex v. Mosley, 5 East 224 (1804) cited by petitioner for the proposition that "where the father had custody of a bastard child fairly, the courts would *not* remove it on the grounds that he had no parental rights (Pet's. Br. 61), reads:

> "Lord Kenyon C.J. Take a rule. Where the father has the custody of the child fairly, I do not know that this Court would take it away from him; though I do not mean to impeach the propriety of the case cited. But where he has got possession of the child by force or fraud, as is here suggested, we will interfere to put matters in the same situation as before. Rule granted."

This dicta of Lord Kenyon does not aid petitioner's assertion, as the case Lord Kenyon was referring to was that of Rex v. Soper, 101 Eng. Rep. 156 (K.B. 1793) holding that the illegitimate father had no right of custody even after an order of filiation had been entered against him under the Poor Law Acts.

Petitioner relies on Kent's statement that "the rule that a bastard is nullius filius, applies only to the case of inheritance." (Pet's. Br. 62). This reference was not an admission of any rights in the putative father but only a reference to the fact that in England a bastard child was not, by reason of his birth, under the severe disabilities that were placed against him on the continent. 2 Pol-

Neither the mother nor the father had custody of the child born out of wedlock under the common law at the time it was adopted by Illinois. However, the Illinois legislature presumed custody of the child to be in the mother. While no express statutory reference to custody absent a paternity proceeding appears under early Illinois law, the mother of a child born out of wedlock was given the power to bind a child as an apprentice, while in the case of a married couple, the father was given that power. Revised Laws of Illinois, 1833, Apprentices, § 1. In its earliest paternity act, the Illinois legislature created three possibilities relating to the cus-

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lock and Maitland, History of English Law, 397 (2nd ed.; Queen v. Brighton, 121 Eng. Rep. 782, 783 (K.B. 1861), (Comment of Cockburn, J., upon the argument); Horner v. Horner, 161 Eng. Rep. 573, 578 (Ch., 1799).

While petitioner cites Kent for the proposition that "the putative father might assert a right to the custody of the child as against a stranger," (Pet's. Br. 62) with all respect to the learned James Kent, the statement cannot be supported. The lone case cited by Kent for the assertion that there is a possible right to custody in the father is Rex v. Cornforth, 2 Stranges Rep. 1162, (1742). That report reads in its entirety.

> "The court granted an information against the defendants for taking away a natural daughter under sixteen, under the care of her putative father: being of the opinion it was within the third sect. of 4 and 5 Phil. & M. c.8."

That statute provided that the father or mother *or any person* having lawful custody of a young maiden could maintain an action for her recovery, 4 and 5 Phil. & M. c. 8, § 3 (1557). Rex v. Cornforth, supra, and the case of The Guardians of St. Mary Abbots', Kensington, 4 T.L.R. 63 (1887) are similarly and erroneously cited for the assertion of residual rights in the putative

tody and support of an illegitimate child. First, if the reputed father paid into the court a "bond and security" for the care and maintenance of the child, he was entitled to custody of the child upon demand. Second, if the reputed father paid the required "bond and security" but the mother refused to surrender the child to the father on demand, he was thereafter released from any obligation to support the child. Third, if the father failed to post the proper "bond and security," he would be obligated to pay up to $50 per year, for seven years, for the support of the child. In the latter case, the father was not entitled to custody of the child. The act further provided that marriage of the parents legitimated the child. Revised Laws of Illinois, 1833, Illegitimate Children.

In the case of *Wright* v. *Bennett*, 7 Ill. 587 (1845), suit was brought by a child's mother pursuant to this act. After being adjudicated as the father, the plaintiff demanded custody of the child. Despite the inhumanity of the situation, the Supreme Court of Illinois ordered the child placed in the custody of the illegitimate father.

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father in 2 Hallisbury's Laws (1st ed.) § 751. St. Mary Abbots' held only that the father of an illegitimate child has no legal right to the custody of the child, but if he was in a proper position to receive him, St. Mary Abbots' could properly give the child to him. St. Mary Abbots' is more properly cited by the Court of Appeals for the proposition that even upon the death of the mother, the putative father had no rights in a child. Re M, 2 Q.B.D. 479 (1955).

The erroneous interpretation of those cases by Hallisbury and Kent is corrected in the third edition of Hallisbury's Laws which notes that on the death of the mother, the father has no right to the child. 3 Hallisbury's Laws (3rd ed.) §§ 167, 169. This rule is, and always has been, the law of England.

By 1872, the mother was permitted to retain custody of the child, at least until it reached the age of ten (10) years, an annotation to the statute noting that it was passed ". . . to prevent the barbarous proceeding as warranted by a former law in *Wright* v. *Bennett,*" Comment, Underwood, W. H., Ill. Rev. Stat. 1879, Ch. 17, § 13, April 3, 1872.

This state of the law continued, with minor changes in support levels, until 1946, when, as petitioner notes (Pet's. Br. 34, 64), the Illinois Attorney General ruled that under the custody provisions of the 1872 Bastardy Act, the putative father's rights must be terminated before adoption and the case of *In re Richards,* 328 Ill. App. 591 (1946), was decided. In that case, a putative father, after unsuccessfully denying paternity, refused to contribute to the support of the child. Because of her poverty, the mother placed the child for adoption. The illegitimate father then attempted to prevent an adoption of the child and gain custody himself. The result was the Bastardy Act of 1949 which provided that the putative father of a child born out of wedlock had no right to custody of the child, except pusuant to an adoption proceeding initiated by him. Ill. Rev. Stat. 1949, Ch. 17, § 13.[10] Although a

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10. England went through a parallel experience between 1950 and 1958. The Adoption Act of 1950, 14 Geo. 6, c. 26, § 2(4)a, provided that the consent of a person under an order rendering him liable to maintain a child must be required in case of an adoption. It took Parliament but eight years to realize the error of equating the duty to maintain a child with the right to prevent that child from obtaining a stable family home and the Act was repealed by the Adoption Act of 1958, 7 and 8 Eliz. 2, c. 5, § 59.

putative father is liable for the support of his child born out of wedlock, Ill. Rev. Stat. 1969, Ch. 106¾, § 52, only a "parent" is personally liable for malicious damage to persons or property by the minor (Ill. Rev. Stat. 1969, Ch. 70, § 53). Only a "parent" or legal guardian has the following responsibilities: criminal liability for abandonment of the child (Ill. Rev. Stat., 1969, Ch. 23, § 2359, for the child's truancy from school (Ill. Rev. Stat., 1969, Ch. 122 § 26-10), for knowingly permitting the child to associate with thieves, visit a place of prostitution, or violate a curfew ordinance (Ill. Rev. Stat., 1969, Ch. 23, § 2369), and criminal liability for a deliberate failure to feed the child resulting in death [See: *Commonwealth* v. *Hall,* 322 Mass. 523, 78 N.E. 2d 644 (1948)]. The consent of the "parent" or legal guardian is required before the child may marry (Ill. Rev. Stat., 1969, Ch. 89, § 3), obtain a hunting license (Ill. Rev. Stat., 1969, Ch. 61, § 186), undergo surgery (Ill. Rev. Stat., 1969, Ch. 91, § 18-2), or possess firearms (Ill. Rev. Stat., 1969, Ch. 38, § 83-4).

Together with his limited liability toward the child, Illinois has limited the illegitimate father's rights in the child. He has no right to custody except by marriage to the child's mother, which legitimates the child, Ill. Rev. Stat., 1969, Ch. 3, § 12; Ch. 89, § 4, or by means of an adoption proceeding initiated by him, Ill. Rev. Stat., 1969, Ch. 106¾, § 62. Whether the child born out of wedlock is legitimated by marriage, adoption by the putative father, or adoption by strangers, the new parent may have the child's original birth certificate impounded and a new certificate of birth issued showing the child to be lawfully born to the adopting or legitimating person, Ill. Rev. Stat., 1969, Ch. 111½, § 73-17.

If a man is adjudicated to be the child's father in a paternity proceeding, the court retains jurisdiction over the

child and on motion of the illegitimate father, may make all orders necessary for the maintenance, education, and welfare of the child. Ill. Rev. Stat., 1969, Ch. 106¾, § 59. If the mother of the child is unfit, the illegitimate father may petition for adoption without her consent, Ill. Rev. Stat. 1969, Ch. 4, § 9.1-1, or to have the child removed from her custody as being neglected, Ill. Rev. Stat. 1969, Ch. 37, § 702-4(1).

Upon the death of the mother of a child born out of wedlock, the child is by definition an orphan, Ill. Rev. Stat. 1969, Ch. 37, § 701-14. A child without a parent is defined as dependent, Ill. Rev. Stat. 1969, Ch. 37, § 702-5(1), and upon petition, the Juvenile Court may appoint a guardian for the child. Ill. Rev. Stat. 1969, Ch. 37, §§ 705-2, 705-7. A guardian in custody of a child pursuant to an order of the Juvenile Court is subject to the full range of parental responsibilities toward the child, Ill. Rev. Stat. 1969, Ch. 37, §§ 701-11, 701-12, although he does not have all the rights of a parent, Ill. Rev. Stat. 1969, Ch. 37, §§ 701-11, 701-16, and cannot consent to an adoption unless specifically authorized to do so by the court, Ill. Rev. Stat. 1969, Ch. 37, § 705-9.

An order of guardianship by the Juvenile Court is never final, but may be modified on application of any party interested in the welfare of the child, Ill. Rev. Stat. 1969, Ch. 37, § 705-8.*

In testing the validity of a classification assailed as violative of the equal protection clause of the fourteenth amendment, the burden of proof is upon the person at-

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*Petitioner asserts that this comprehensive legislation violates the equal protection guarantee in its application to putative fathers.

tacking the classification, *Goesaert* v. *Cleary*, 335 U.S. 464 (1948); *Morey* v. *Doud*, 354 U.S. 457 (1957). From a barren record, a state of facts opposing the legislative classification cannot be presumed, *Metropolitan Casualty Insurance Co. of New York* v. *Brownell*, 294 U.S. 580, 585 (1935), nor can the mere presentation of conflicting theories regarding the validity of the classification sustain the burden of one challenging the classification, *Ginsberg* v. *State of New York*, 390 U.S. 629, 641-2 (1968). Equally clear is the extensive scope of the discretion vested in the legislatures of the various states, *McGowan* v. *Maryland*, 366 U.S. 420, 425 (1961); *Truax* v. *Corrigan*, 257 U.S. 312, 357 (1921) (Mr. Justice Brandeis, dissenting.). This is particularly true where the legislative discretion affects children, *Prince* v. *Commonwealth of Massachusetts*, 321 U.S. 158, 167-8 (1944).

In contrast to the burden of proof which must normally be borne by the party assailing a classification, where a classification involves an infringement upon a fundamental right, the burden is upon the State to show a compelling interest in the object of the classification. *Shapiro* v. *Thompson*, 394 U.S. 618, 634 (1969); *Levy* v. *Louisiana*, 391 U.S. 68 (1968); *Glona* v. *American Guarantee & Liability Insurance Co.*, 391 U.S. 73 (1968).

To state the object of the classification—the welfare of children—is to state a compelling interest. While we will demonstrate that the classification herein questioned involves no invasion of a fundamental right, *Labine* v. *Vincent*, —— U.S. —— (1971); we shall also demonstrate that even were this not so, the interest of the State in the welfare of children and the procreation of the species by and through the marriage relationship is such a compelling state interest that the statutes must still be upheld as necessary to their objective.

The mere fact of classification by a legislature results in advantages to some and disadvantages to others. This is inherent in making a classification.[11] There are, however, disadvantages which are in the best interests of society.[12] The equal protection clause of the Constitution ". . . only prescribes that the law have the attribute of equality of operation, and equality of operation does not mean indiscriminate operation on persons, merely as such, but on persons according to their relations." *Magoun* v. *Illinois Trust and Savings Bank,* 170 U.S. 283 (1898). See also: *Labine* v. *Vincent,* —— U.S. —— (1971); *De Sylva* v. *Ballentine,* 351 U.S. 570 (1956); *Traux* v. *Corrigan,* 257 U.S. 312, 350 (1921) (Mr. Justice Pitney, dissenting). In light of these requirement, we turn to a discussion of the Illinois statute defining "parent".

By defining "parent" to exclude putative fathers of illegitimate children, Illinois has attemped to confront realistically and to treat a problem in an area in which the states have a legitimate, and indeed compelling, governmental objective. The problem is the care, training and education of those children for whom no adult will voluntarily assume legal responsibility. The State's governmental objective is the protection of those of its citizens who are unable to care for themselves. The issue presented by this case is whether Illinois has chosen a reasonable means of dealing with this problem.

Fundamental to the state is the welfare of its children. While the rearing of children within a marriage is an

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11—Kotch v. Board of River Pilot Com'rs., 330 U.S. 552, 563 (1947).

12—Heisler v. Thomas Colliery Company, 260 U.S. 245, 255 (1922).

inherent right of parenthood,[13] "[t]he State also has an independent interest in the well being of its youth,"[14] and can regulate even the rights of married parents over their children. No right, including freedom of religion, is entitled to paramount consideration over the state's reasonable attempts to secure the welfare of its children, *Prince* v. *Commonwealth of Massachusetts*, 321 U.S. 158 (1944).

The rights of married parents to raise and educate their children are not absolute.[15] The State may in-

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13. New York ex rel. Halvey v. Halvey, 330 U.S. 610, 613 (1947);
Ginsberg v. State of New York, 390 U.S. 629, 638 (1968);
Prince v. Commonwealth of Mass., 321 U.S. 158, 166 (1944).

14. Ginsberg v. State of New York, 390 U.S. 629, 640 (1968).

15. The question of the circumstances under which the state can remove the control of children from the custody of legal parents has been the source of ultimate confusion. The test has been defined as limited except for the grossest misconduct, King v. Greenhill, 4 A. & E. 624, 639 (K.B. 1836); that a fit parent cannot be deprived of custody or control, Roche v. Roche, 152 P. 2d. 999 (Cal. 1944); Stout v. Stout, 166 Kan. 459, 201 P. 2d 637 (1949); as a parental right subject to the best interests of the child, Sturtevant v. State of Nebraska ex rel. Havens, 19 N.W. 617 (1884) and as a superior parental right subject to the qualification that "it is not necessary that the natural parent be found unfit in order to award custody of his child." Pace v. Wood, 50 Ill. App. 2d 63, 68, 200 N.E. 2d 125, 127 (1964). The conflicting considerations are ably summarized by Black, J., concurring in Ernst v. Flynn, 373 Mich. 337, 129 N.W. 2d 430 (1964), who stated:

terfere with this relationship when the welfare of the child so requires.[16] Logically, the State may intervene in a similar situation involving a child whose parents are not married to each other. No government has an interest in protecting only legitimate children. Indeed, the only relevant consideration in determining the propriety of governmental intervention in the raising of children is whether the best interests of the child are served by such intervention.

In effect, Illinois has imposed a statutory presumption that the best interests of a particular group of children necessitates some governmental supervision in certain clearly defined situations. The group of children who are illegitimate are distinguishable from legitimate children not so much by their status at birth as by the factual differences in their upbringing. While a legitimate child usually is raised by both parents with the attendant familial relationships and a firm concept of home and identity, the illegitimate child normally knows only one parent—the mother. This may be the result of innumerable factors—the natural father may be married to another woman, the natural mother may be married to another man, the natural mother and father have no de-

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"we do have 'two irreconcilable lines of cases'—pure shuttlecock law that is—for whimsical application to child custody controversies." 129 N.W. 2d at 439.

The confusion between the interests of the child and rights of the illegitimate father that appears in the briefs filed on behalf of petitioner herein is but an example of that "shuttlecock law."

16. The death of a married parent having a right of custody is such an occasion. Ex parte Day, 189 Wash. 368, 65 P. 2d 1049 (1937).

sire to marry and provide a two-parent home for the child, or the natural father may not know of or want the child.

Clarity requires a reference to the alleged facts of this case for a moment. The petitioner has premised his argument upon particular factual circumstances—a lengthy relationship with the mother of two children whose paternity he admits in the proceedings below, a familial relationship with the two children, and a general assumption that this relationship approximates that in which the natural parents are married to each other.

The petitioner thus attempts to characterize himself as a defacto father. Even if this characterization were accurate (the record is insufficient to support it) it would not affect the validity of the statutory definition of parent. If a classification is otherwise valid, the existence of occasional factual dissimilarities among members of the class is insufficient to void the classification, *McGowan* v. *Maryland*, 366 U.S. 420 (1961); *Jacobson* v. *Massachusetts*, 197 U.S. 11 (1905). There can be no question that illegitimate children who are not placed with state agencies or given out for adoption normally are raised by only one of their natural parents—the mother. The petitioner does not deny that the children are illegitimate. The record reflects their natural mother's death. Given these two factors, grounds exist for the State's intervention to ensure adequate care and protec-

tion for these children. This is true whether or not this particular petitioner assimilates all or none of the normal characteristics common to the classification of fathers who are not married to the mothers of their children.

Petitioner asserts that the definition of parent is invalid at two levels: that comparing putative fathers to married fathers, and that comparing putative fathers to unmarried mothers. We will treat this argument on both levels.

The comparison of married and putative fathers involves exclusively factual differences. The most significant of these are the presence or absence of the father from the home on a day-to-day basis and the responsibility imposed upon the relationship. Normally, a father married to the mother of his children lives with them, creating the basic family unit upon which our society is based. Indeed, procreation of the race through the marital relationship is a basic civil right which the State encourages. See: *Skinner* v. *Oklahoma,* 316 U.S. 535 (1942); *Loving* v. *Virginia,* 388 U.S. 1 (1967). In furtherance of its interests in the marriage relationship, states have adopted overwhelming presumptions of legitimacy shy of a showing of nonaccess, *Patterson* v. *Gaines,* 47 U.S. 550 (1848), and even forbidden a married mother to bastardize her child by bringing a paternity action when the child was born in wedlock, *Kennelly* v. *Davis,* 221 So. 2nd 415 (Fla. 1969) *cert. den.* 396 U.S. 916 (1969). The State has also imposed responsibilities upon this relationship. The married father is legally responsible for the support and upbringing of his family. In Illinois,

the married parents are criminally responsible for certain actions of their children as well as civilly liable for their children's malicious damage to another's property.

The putative father normally does not live with the mother of his illegitimate children on a permanent basis. He establishes no fixed family unit, but only a transient relationship in which he bears no responsibilities other than the pecuniary obligation of support, which requires court action by the mother before it is enforceable. In practice, a putative father often has no responsibilities either to the mother or to his illegitimate children. While this situation may be required to preserve other legal relationships, such as the mother's marriage to another man or the putative father's marriage to another woman, *Labine* v. *Vincent*, —— U.S. —— (1971), it certainly provides a valid distinction between the putative father and the married father in the nature of their relationships with their natural children. Such a distinction sustains a statutory classification under the equal protection clause. *Tigner* v. *Texas*, 310 U.S. 141 (1940).

We turn now to the second level of petitioner's argument—that the definition of parent unreasonably distinguishes between the natural father and the natural mother of children born out of wedlock. From a silent record the petitioner asks this Court to assume that a classification based upon sex is irrational. However, ". . . the role of the father within his family and his relationship with his children appear to be further removed from the instinctual roots than those of the mother." Therese Benedek, "Fatherhood and Providing", *Parenthood*, (Anthony and Benedek, editors, 1970), p. 167.

Mothering, on the other hand, is the result of the primary sexual drives of females.[17] The male's biological tendencies toward becoming and being a father are ". . . based upon the assumption that there are two sources of fatherlyness: one, biological bisexuality; and the other, the biological dependancy on the mother." T. Benedik, "Parenthood as a Developmental Phase," 7 J. Am. Psychoanalytic Assoc. 389, 398 (1959).

Unlike females, the male's parental functions do not involve specific physiologic process. There is no hormonal stimulation.[18] Both with animals,[19] and with human beings,[20] the level of female hormones can affect behavior toward the young.[21]

While temperament toward child rearing may be largely a product of societal conditioning,[22] these temperamental patterns have been so deeply ingrained within western civilization that they cannot be ignored. *Hoyt* v. *Florida,* 368 U.S. 57, 63 (1967).

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17. Therese Benedek, "Parenthood as a Development Phase", 7 J. Am. Psychoanalytic Asso. 389 (1959).

18. Id., at 399.

19. Sylvia Brody, Patterns of Mothering, p. 32-40, (International U. Press, Inc., 1958).

20. Id., at 60, 63.

21. Therese Benedek, "Discussion of The Evolution and Nature of Family Sexuality In Relation to Psychoanalytic Theory", 16 J. Am. Psychoanalytic Assoc. 424, 436-7 (1968).

22. Margaret Mead, Sex and Temperament (Laurel ed. 1968).

> "The mother's nurturing tie to her children is apparently so deeply rooted in the actual biological conditioning of conception and gestation, birth and suckling, that only complicated social arrangements can break it down entirely * * * but the evidence suggests that we should phrase the matter differently for men and women—that men have to learn to want to provide for others, and this behavior, being learned, is fragile and can disappear under social conditions that no longer teach it effectively." Margaret Mead, Male and Female, p. 197 (Laurel ed., 1968).[23]

The chosen institution of the state is marriage. The rationale of the institution is what makes it a fundamental concern of the States.[24]

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23. In the omitted portion quoted above, Dr. Mead also notes that "where society has so overdone the ritual of legitimacy that men are kept good providers only at the cost of social ostracism of the unmarried mother, the mother of an illegitimate child may abandon it or even kill it."

24. While, in the context of marriage, courts have spoken of parental rights as inherent, New York ex rel. Halvey v. Halvey, 330 U.S. 610, 613 (1947) or sacred private interests, Prince v. Commonwealth of Massachusetts, 321 U.S. 158, 165 (1944), the rights that parents do have are for the benefit of the child. United States v. Green, 26 Fed. Cas. 30 (1824). Chapsky v. Wood, 26 Kan. 650 (1881).

The state's interest in children is independent, Ginsberg v. New York, 390 U.S. 629, 639 (1968), part of its

That at the moment of birth a mother must be present is necessary by definition. The married father is usually present to lend his aid and succor. The unmarried father is not generally present. The married male, by his marriage contract with the female and the State, undertakes and is legally bound to support, care for, and maintain his children from the moment of birth. While many states have made the unmarried father civilly and criminally liable for the maintenance of his children, fatherhood is more than support. The married male and the female, whether she is married or not, are required to attend to the schooling, medical care, and other needs of the children.[25] The most that society requires of the un-

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police power, Prince, supra, at 169, and the first consideration in a custodial battle. Ford v. Ford, 371 U.S. 187, 193 (1962); New York ex rel. Halvey v. Halvey, supra., at 616 (Mr. Justice Frankfurter, concurring). Not since Eyre v. Countess of Shaftsbury, 24 Eng. Rep. 659, (Ch. 1722) and Blisset's Case, 98 Eng. Rep. 899, 890, (K.B. 1774) has it ever been questioned that the power of the state as *parens patriae* is paramount. Thus, the courts can interfere in the custody of children, "for the protection of infants, qua infants, by virtue of the prerogative which belongs to the Crown as parens patriae, and the exercise of which is delegated to the Great Seal." Queen v. Gyngall, 2 Q.B.D. 232 (1893).

25. While the state has imposed the full range of parental duties on the mother of a child born out of wedlock and granted her the full range of parental rights, it has imposed but limited duties and rights on the unmarried father.

> "This may be explained by historical experience from which it is assumed that the overwhelming percentage of fathers of out-of-wedlock children are not interested in their children, in recognizing them, in

married male upon the birth of the child is money payments.[26] To give the unmarried male the advantage of

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supporting them, in legitimating them, or especially in seeking their custody." In re Brennan, 270 Minn. 455, 460, 134 N.W. 2d 126, 131 (1965).

While not determinative, Harper v. Virginia State Board of Elections, 383 U.S. 663, 669 (1966), history, Kotch v. Board of River Port Commissioners, 330 U.S. 552, 557 (1947), the traditions of society, Tigner v. Texas, 310 U.S. 141, 149 (1940) and an historic public policy of family responsibility must be considered in evaluating the legislative judgment. Hoyt v. Florida, 368 U.S. 57, 63

History also demonstrates that in devising the Illinois statutory scheme, the legislature property took account of the fact that custody fights over children are used as a means of extortion in bastardy proceedings, In re Richards, supra p. 13, Wright v. Bennett, supra p. 13, as economic and emotional levers in divorce proceedings, Andrew Watson, "The Children of Armageddon", 21 Syracuse L. Rev. 55, 59 (1969), as a means of gaining control over an inheritance, Ex parte Hopkins, 24 Eng. Rep. 1009 (Ch. 1732), and, as in this case, as a means of controlling funds due children, supra p. 6.

These custody battles are not to the good of the children involved, New York ex rel. Halvey v. Halvey, 330 U.S. 610, 619 (1947) (Mr. Justice Rutledge, concurring). With respect to children born out of wedlock, the Illinois legislature has minimized these uses to which custody battles may be put by looking solely to the best interests of the child.

26. Various states have made putative fathers liable for failure to support their biologic offspring, some prior to paternity proceedings, Moreno v. Superior Court of Pima County, 414 P. 2d 749 (Ariz. 1966), and some only after an adjudication of paternity, Turner v. State, 104 So. 2d 775 (Ala. App. 1964). No state has, however, imposed the full range of parental responsibilities on the

choosing between only support and the full range of parental responsibilities, is to put, for the unmarried male, a premium on procreating out of wedlock. So considered, it would deny equal protection of the law to the married male and to married and unmarried females, to grant this option to the unmarried male at the birth of a child.[27]

Thus, the distinction drawn by Illinois between responsible, physically present mothers and fathers, and putative fathers who are neither legally responsible nor physically present in the home on a permanent basis is a valid classification based upon identifiable differences among the people affected.

The only remaining question then is whether this classification is a reasonable means of insuring the welfare of minor children within the State. In making this evaluation, it of course is irrelevant whether the State might have chosen other methods of achieving the same result. "The Constitution is satisfied if a legislature responds to the practical living facts with which it deals.

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putative father upon the birth of the child. Nor has any state granted, by virtue of the biologic relationship at birth, the status of a married parent. See Appendix B of the instant Brief.

27. To grant after the birth of the child rights of the putative father over the child, and to force upon the child obligations to his illegitimate father, Ill. Rev. Stat. 1965, Ch. 23, § 112, solely by volition of the father and without consulting the interests of the mother or child, would violate due process of law toward the mother and child, Day v. Hatton, 210 Ga. 749, 83 S.E. 2d 7 (1954); Harry Krause, "The Non-Marital Child," 1 Fam. Law Quarterly 1, 6 (1967); Compare, Rule v. Geddes, 23 App. D.C., 31, 50 (1904).

Through what precise points in a field of many competing pressures a legislature might most suitably have drawn its lines is not a question for judicial reexamination. It is enough to satisfy the Constitution that in drawing them the principle of reason has not been disregarded. . . ." *McGowan* v. *Maryland*, 366 U.S. 420, 459 (1961) (concurring opinion of Mr. Justice Frankfurter).

Illinois does not preclude putative fathers from obtaining the custody of their natural children. To the contrary, the State has provided procedures whereby the father may legitimate and assume the guardianship of the children or he may adopt them. Thus, a putative father who is willing to accept parental responsibilities for the children may obtain their custody upon a showing that he is a fit parent in whose custody the bests interests of the children would be served.[28] Petitioner, however, argues that requiring the putative father to make such a showing violates the equal protection guarantee since neither married parents or the unmarried mother are required to make such a showing to obtain custody of their natural children. This argument ignores the

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28. By looking only to the best interests of the child, a trial court must necessarily weigh petitioner's assertion of a biologic and familial relationship, if one exists, Paul Sayer, "Awarding Custody of Children", 9 U. Chi. L. Rev. 672, 684 (1942). Under this statutory scheme it was unnecessary at the time of the hearing here in question, and still is unnecessary, to reach the question of petitioner's fitness. Petition of Malmstedt, 243 Md. 92, 220 A. 2nd 147, 149 (Md. App., 1966); cert. denied 385 U.S. 976 (1966); Wright v. Wright, 2 Mass. 109, 110 (1806).

factual and legal differences between putative fathers and those persons defined by the statute as "parents".[29] In most instances, the natural father is a stranger to his children. In all cases, the natural father has only the legal duty of rendering financial support to his children and is subject to no other responsibilities toward the child. To equalize these factual differences between putative fathers and those persons defined as parents, Illinois requires the petitioner and others similarly situated to subject themselves to a legal proceeding evidencing their desire to assume the legal responsibilities inherent in the physical custody of children.

This proceeding approximates an adoption or guardianship proceeding instituted by a person bearing no blood relationship to the child and in which the best interest showing is required. These proceedings are clearly distinguishable from both the marital relationship and the situation involving unwed mothers. In these latter instances, the State presumes that custody would be in

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29. Were this case an application for writ of habeas corpus by petitioner to regain custody of the children, his custodial rights would clearly be subject to a showing of the best interests of the children in determining a change of custody. The test has been applied to legal fathers, Green v. Campbell, 35 W. Va. 698, 14 S.E. 212 (1891); Trenton v. Christ, 216 Md. 418, 140 A. 2d 660 (1958); to the legal mother. In re Hope, 19 R.I. 486, 34 A. 994 (1896); and to a mother who left a child with its illegitimate father, Comm. ex rel. Settlemire v. Stephens, 127 Pa. Super 188, 193 A. 80 (1937). Admitting that under these standards he is in no position to demand custody of the children (Pet's. Br. 13-14), the petitioner nevertheless maintains that the best interest of the child test is irrational as applied to the question of legal responsibility.

the best interests of the child due to the interest of the State in perpetuating the marriage relationship or, in the case of the unwed mother, a combination of the presumption that a mother is better suited to caring for her child than even the natural father with the need of making at least one person legally responsible for the welfare and protection of a minor child. Both of these presumptions, however, may be overcome. The State, to protect its paramount interest in the welfare of the child, may interfere in the marital or the mother-child relationship if the best interests of the child so require. See footnote 15, *infra*.

The proceeding involving either a putative father or other persons seeking custody is distinguishable on several bases. First, the children are in existence and are, therefore, individuals whose personalities and needs are both measurable and relevant to the case.[30] Second, the persons seeking custody are distinguishable both factually and legally from those people defined as parents. And third, the proceeding will have the effect of allocating responsibilities by court order which are automatically vested upon "parents" regardless of their personal preferences.

Illinois has adopted a comprehensive statutory pattern to protect minor children from abuse and neglect. The plan treats those subject to its provisions according to their needs and responsibilities. The classification distinguishing putative fathers, from persons defined as "parents" is a reasonable method of imposing upon natural fathers by court order the obligations imposed automatically upon "parents" by statute. The legislature

30. Harry Krause, "Equal Protection for the Illegitimate," 65 Mich. L. Rev. 477, 484 (1967).

has attempted to equalize two very different interests—that of "parents" and that of putative fathers—in a manner consistent with the ultimate objective of protecting the best interests of the child. There is no constitutional infirmity.

CONCLUSION

The State of Illinois respectfully requests that the judgment of the Supreme Court of Illinois be affirmed.

Respectfully submitted,

WILLIAM J. SCOTT,
Attorney General,
State of Illinois,

JOEL M. FLAUM,
First Assistant Attorney General,

MORTON E. FRIEDMAN,
Assistant Attorney General,
188 West Randolph Street (Suite 2200),
Chicago, Illinois 60601 (312-793-2570),

Attorneys for Respondent.

APPENDIX "A"

STATUTORY PROVISIONS

Illinois Revised Statutes, 1969, Chapter 3 (Administration of Estates)

Section 12-8 (illegitimates)

1969 State Bar Association Edition, Vol. 1, 37.

An illegitimate child is heir of his mother and of any maternal ancestor, and of any person from whom his mother might have inherited, if living; and the lawful issue of an illegitimate person shall represent such person and take, by descent, any estate which the parent would have taken, if living. An illegitimate child whose parents intermarry and who is acknowledged by the father as the father's child shall be considered legitimate.

Illinois Revised Statutes, 1969, Chapter 4, (Adoption).

Section 9.1-1 (definitions).

1969 State Bar Association Edition, Vol. 1, 86-7.

When used in this Act, unless the context otherwise requires:

A. "Child" means a person under legal age subject to adoption under this Act;

B. "Related child" means a child subject to adoption where either or both of the adopting parents stands in any of the following relationships to the child by blood or marriage: parent, grand-parent, brother, sister, step-parent, step-grand-parent, step-brother, step-sister, uncle, aunt, great-uncle, great-aunt, or cousin of first degree;

C. "Agency" for the purpose of this Act means a public child welfare agency or a licensed child welfare agency;

D. "Unfit person" means any person whom the court shall find to be unfit to have a child sought to be adopted, the grounds of such unfitness being any one of the following:

(a) Abandonment of the child;

(b) Failure to maintain a reasonable degree of interest, concern or responsibility as to the child's welfare;

(c) Desertion of the child for more than 3 months next preceding the commencement of the Adoption proceeding;

(d) Substantial neglect of the child if continuous or repeated;

(e) Extreme or repeated cruelty to the child;

(f) Failure to protect the child from conditions within his environment injurious to the child's welfare;

(g) Other neglect of, or misconduct toward the child; provided that in making a finding of unfitness the court hearing the adoption proceeding shall not be bound by any previous finding, order, judgment or decree affecting or determining the rights of the parents toward the child sought to be adopted in any other proceeding except such proceedings terminating parental rights as shall be had under either this Act or the Juvenile Court Act;

(h) Depravity;

(i) Open and notorious adultery or fornication;

(j) Habitual drunkenness for the space of one year prior to the commencement of the adoption proceeding.

E. "Parent" means the father and mother of a legitimate child, the surviving parent of a legitimate child, or the natural mother of an illegitimate child;

F. "In need of mental treatment" means any one or more of the following:

(a) Adjudged by a court to be in need of mental treatment pursuant to the provisions of the Mental Health Code;

(b) Adjudged by a court of competent jurisdiction to be insane or mentally ill under any prior law of this State;

(c) Adjudged by a court of competent jurisdiction to be insane pursuant to the provisions of any law of this State relating to criminal jurisprudence;

G. "Mentally retarded" as used in this Act shall mean either of the following:

(a) Adjudged by a court to be mentally retarded pursuant to the provisions of the Mental Health Code; or

(b) Adjudged by a court of competent jurisdiction to be feebleminded under any prior law of this State;

H. A person is available for adoption when:

(a) A child has been surrendered for adoption to an agency and to whose adoption such agency has thereafter consented;

(b) A child to whose adoption a person authorized by law, other than his parents, has consented, or to whose adoption no consent is required pursuant to Section 8 of this Act;

(c) A child is in the custody of persons who intend to adopt him through placement made by his parents;

(d) An adult meets the conditions set forth in Section 3 of this Act;

I. The singular includes the plural and the plural includes the singular and the "male" includes the "female", as the context of this Act may require.

Illinois Revised Statutes, 1969, Chapter 37, (Juvenile Court Act).

Section 701-11 (guardianship)

1969 State Bar Association Edition, Vol. 1, 1562.

"Guardianship of the person" of a minor means the duty and authority subject to residual parental rights and responsibilities, to make important decisions in matters having a permanent effect on the life and development of the minor and to be concerned with his general welfare. It includes but is not necessarily limited to

(a) the authority to consent to marriage, to enlistment in the armed forces of the United States, or to a major medical, psychiatric, and surgical treatment; to represent the minor in legal actions; and to make other decisions of substantial legal significance concerning the minor;

(b) the authority and duty of reasonable visitation, except to the extent that these have been limited by the court order;

(c) the rights and responsibilities of legal custody except where legal custody has been vested in another person or agency; and

(d) the power to consent to the adoption of the minor, but only if expressly conferred on the guardian in accordance with Section 5—9.

Section 701-12 (legal custody)

1969 State Bar Association Edition, Vol. 1, 1562.

"Legal custody" means the relationship created by an order of court which imposes on the custodian the responsibility of physical possession of a minor and the duty to protect, train and discipline him

and to provide him with food, shelter, education and ordinary medical care, except as these are limited by residual parental rights and responsibilities and the rights and responsibilities of the guardian of the person, if any.

Section 701-14 (parents)
1969 State Bar Association Edition, Vol. 1, 1562.

"Parents" means the father and mother of a legitimate child, or the survivor of them, or the natural mother of an illegitimate child, and includes any adoptive parent. It does not include a parent whose rights in respect of the minor have been terminated in any manner provided by law.

Section 702-4 (1) (neglected minor)
1969 State Bar Association Edition, Vol. 1, 1563.

(1) Those who are neglected include any minor under 18 years of age.

(a) who is neglected as to proper or necessary support, education as required by law, or as to medical or other remedial care recognized under State law or other care necessary for his well-being, or who is abandoned by his parents, guardian or custodian; or

(b) whose environment is injurious to his welfare or whose behavior is injurious to his own welfare or that of others.

Section 702-5. (1) (dependent minor)
1969 State Bar Association Edition, Vol. 1, 1563-4.

Those who are dependent include any minor under 18 years of age (a) who is without a parent, guardian or legal custodian;

(b) who is without proper care because of the physical or mental disability of his parent, guardian or custodian; or

(c) who has a parent, guardian or legal custodian who with good cause, wishes to be relieved of all residual parental rights and responsibilities, guardianship or custody, and who desires the appointment of a guardian of the person with power to consent to the adoption of the minor under Section 5—9.

Section 705-2 (c) (dispositional orders)

1969 State Bar Association, Edition, Vol. 1, 1563.

(c) A minor under 18 years of age found to be neglected under Section 2—4 may be (1) continued in the custody of his parents, guardian or legal custodian, or (2) placed in accordance with Section 5—7.

Section 705-7 (placement, legal custody, or guardianship)

1969 State Bar Association Edition, Vol. 1, 1569.

(1) If the court finds that the parents, guardian or legal custodian of a minor adjudged a ward of the court are unfit or are unable, for some reason other than financial circumstances alone, to care for, protect, train, discipline the minor or are unwilling to do so, and that it is in the best interest of the minor to take him from the custody of his parents, guardian or custodian, the court may

(a) place him in the custody of a suitable relative or other person;

(b) place him under the guardianship of a probation officer;

(c) commit him to an agency for care or placement, except an institution under the authority of the Department of Corrections or of the Department of Children and Family Services;

(d) commit him to some licensed training school or industrial school;

(e) except in the case of a neglected or dependent minor under 18 years of age adjudged a ward of the court under Section 2—4 or 2—5, commit him to any appropriate institution have among its purposes the care of delinquent children, including a child protective facility maintained by a Child Protection District serving the county from which commitment is made, but not including any institution under the authority of the Department of Corrections or of the Department of Children and Family Services; or

(f) in the case of a neglected or dependent minor under 18 years of age adjudged a ward of the court under Section 2—4 or 2—5, commit him to the Department of Children and Family Services for care and service. The Department shall be given due notice of the pendency of such action and the Chief of the Division of Child Welfare of the Department shall be appointed guardian of the person of such minor. Whenever the Department discharges a minor from its care and service, the Chief of the Division of Child Welfare of the Department shall petition the court for an order terminating guardianship.

(2) When making such placement, the court, whenever possible, shall select a person holding the same religious belief as that of the minor or a private agency controlled by persons of like religious faith of the minor. In addition, whenever alternative plans for placement are available, the court shall ascertain and consider, to the extent appropriate in the particular case, the views and preferences of the minor.

(3) When a minor is placed with a suitable relative or other person, the court shall appoint him the legal custodian or guardian of the person of the minor. When a minor is committed to any agency, the court shall appoint the proper officer or representative thereof as legal custodian or guard-

ian of the person of the minor. Legal custodians and guardians of the person of the minor have the respective rights and duties set forth in Section 1-11 except as otherwise provided by order of court; but no guardian of the person may consent to adoption of the minor unless that authority is conferred upon him in accordance with Section 5—9. An agency whose representative is appointed guardian of the person or legal custodian of the minor may place him in any child care facility, but if such agency is an institution it must be licensed to place children in foster homes. Like authority may be conferred by the court upon any probation officer who has been appointed guardian of the person of a minor.

(4) The clerk of the court shall issue to such legal custodian or guardian of the person a certified copy of the order of court, as proof of his authority. No other process is necessary as authority for the keeping of the minor.

(5) Custody or guardianship granted hereunder continues until the court otherwise directs, but not after the minor reaches the age of 21 years.

Section 705-8 (change of custody)

1969 State Bar Association Edition, Vol, 1, 1570.

(1) The court may require any legal custodian or guardian of the person appointed under this Act to report periodically to the court or may cite him into court and require him or his agency to make a full and accurate report of his or its doings in behalf of the minor. The custodian or guardian, within 10 days after such citation, shall make the report, either in writing verified by affidavit or orally under oath in open court, or otherwise as the court directs. Upon the hearing of the report the court may remove the custodian or guardian and appoint another in his stead or restore the minor to the custody of his parents or former guardian or custodian.

(2) The minor or any person interested in the minor may apply to the court for a change in custody of the minor and the appointment of a new custodian or guardian of the person or for the restoration of the minor to the custody of his parents or former guardian or custodian. No legal custodian or guardian of the person may be removed without his consent until given notice and an opportunity to be heard by the court.

Section 705-9 (power of guardian to consent to adoption)

1969 State Bar Association Edition, Vol. 1, 1570.

(1) A ward of the court under this Act, with the consent of the court, may be the subject of a petition for adoption under "An Act in relation to the adoption of persons, and to repeal an Act therein named", approved July 17, 1959, as heretofore or hereafter amended, or with like consent his parent or parents may, in the manner required by such Act, surrender him for adoption to an agency legally authorized or licensed to place children for adoption.

(2) If the petition prays and the court finds that it is in the best interests of the minor that a guardian of the person be appointed and authorized to consent of the parents, if living, or after finding a non-consenting parent to be unfit as provided in this Section, may empower the guardian of the person of the minor, in the order appointing him as such guardian, to appear in court where any proceedings for the adoption of the minor may at any time be pending and to consent to the adoption. Such consent is sufficient to authorize the court in the adoption proceedings to enter a proper order or decree of adoption without further notice to, or consent by, the parents of the minor. An order so empowering the guardian to consent to adoption terminates parental rights, deprives the parents of the minor of all legal rights as respects the minor and

relieves them of all parental responsibility for him, and frees the minor from all obligations of maintenance and obedience as respects his natural parents.

(3) Parental consent to the order authorizing the guardian of the person to consent to adoption of the Minor shall be given in open court whenever possible and otherwise must be in writing and signed in the form provided in "An Act in relation to the adoption of persons, and to repeal an Act therein named", approved July 17, 1959, as heretofore or hereafter amended, but no names of petitioners for adoption need be included. A finding of the unfitness of a nonconsenting parent must be made in compliance with that Act. Provisions of that Act relating to minor parents and to mentally ill or mentally deficient parents apply to proceedings under this Section.

Illinois Revised Statutes, 1969, Chapter 89, (Marriage) § 4 (effect of marriage)

1969 State Bar Association Edition, Vol. 2, 573.

Marriages may be celebrated either by a minister of the gospel in regular standing in the church or society to which he belongs by a judge or magistrate of any court of record, or if the parties, or either of them, are members of the religious society known as Friends or Quakers, they may lawfully be married by making known their intentions to marry to a standing committee of any official meeting at least one week before such marriage is consummated, and by appearing in a public meeting or private gathering before official witnesses of that body, with a certificate duly setting forth the names and residence of each contracting party, and of the parents of each, if living, which certificate shall be signed by the contracting parties and the official witnesses and shall be publicly read by one of the witnessing parties and afterwards duly recorded upon the records of an organized meeting of the society.

However, all marriages commonly known as "common law marriages" entered into after June 30, 1905 are null and void unless after the contracting and entering into of any such common law marriage a license to marry be first obtained by such parties who have entered into such common law marriage and a marriage be solemnized as provided by this Act in the same manner as is provided for persons who have obtained a license to be joined in marriage and are about to be joined in any such marriage. And any children born to parties who have entered into such common law marriage shall be and are deemed legitimate upon the parents having obtained a license to marry and are married in the manner provided in this Act.

Ill. Rev. Stat. 1969, Ch. 106¾ (Paternity)

Section 51 (definitions)

1969 State Bar Association Edition, Vol. 2, 1291.

For the purposes of this Act a "child born out of wedlock" is a child whose parents were not married to each other at the time of its birth; provided that a child shall not be considered as born out of wedlock if its parents were married at the time of its conception but divorced at the time of its birth, or if after the conception or birth of the child, the marriage of its parents is declared void for any reason. The definition of legitimacy or illegitimacy for other purposes shall not be affected by this Act.

Section 52 (liability of father and mother to child)
1969 State Bar Association Edition, Vol. 2, 1292.

The father of a child born out of wedlock whose paternity is established in a proceeding under this Act shall be liable for its support, maintenance, education and welfare, until the child's attainment of age 18 or until the child is legally adopted, to the

same extent and in the same manner as the father of a child born in lawful wedlock is liable for its support, maintenance, education and welfare.

The mother of a child born out of wedlock shall also be liable for its support, maintenance, education and welfare to the same extent as if the child had been born in lawful wedlock.

Section 59 (judgment-retention of jurisdiction)

1969 State Bar Association Edition, Vol. 2, 1293.

If the defendant has acknowledged that he is the father of the child, either at the preliminary hearing provided in Section 5 or at the subsequent trial of the issue, which acknowledgment he has not repudiated at the trial of the issue, or if on the trial of the issue the court or jury, as the case may be, finds that he is the father, the court shall enter judgment to that effect. If such judgment is entered the court shall take evidence upon the requirements of the child for its support, maintenance, education and welfare, and upon the expenses of the mother during pregnancy, confinement and recovery, and for reasonable attorney's fees and shall enter an order with respect thereto. The order may be directed to the father or mother, or both. Except where a settlement order has been entered as provided in Section 9A of this Act, the court shall retain jurisdiction of the cause and may, upon proper prior written notice of the hearing to the parties in interest, make new or supplementary orders for the support, maintenance, education and welfare of the child as from time to time the court deems necessary, upon petition of the mother, the father, any interested person who has contributed to the support, maintenance, education and welfare of the child or assumed its support, maintenance, education and welfare, or any governmental agency interested in the support, mainten-

ance, education and welfare of the child. Pending the initial determination of the support order, the court may make provision for bond and security to assure jurisdiction over the person of the defendant, and for the enforcement thereof by commitment of the defendant, in the manner provided in either Section 5 or 7 of this Act.

In determining the amount of support and confinement expenses to be charged to the father, the court shall take into account not only his financial condition and circumstances but also the income and resources of the mother which are or may be available for the support of the child.

Where the father of such child shall die after the adjudication that he is the father of the child and the entry of an order for support and confinement expenses, such unpaid amounts as to support and confinement expenses as shall have accrued at the date of the death of the father shall be a provable claim against the estate.

Section 62 (custody of child)

1969 State Bar Association Edition, Vol. 2, 1294.

A person charged or alleged to be the father of a child born out of wedlock, whether or not adjudicated the father under this Act, shall have no right to the custody or control of the child except such custody as may be granted pursuant to an adoption proceeding initiated by him for that purpose.

Illinois Revised Statutes, 1969, Chapter 111½, (Public Health)

Section 73-17 (new certificate of birth)

1969 State Bar Association Edition, Vol. 2, 1759-60.

(1) For a person born in this State, the State Registrar of Vital Records shall establish a new certificate of birth when he receives any of the following:

(a) A certificate of adoption as provided in Section 16 or a certified copy of the decree of adoption together with the information necessary to identify the original certificate of birth and to establish the new certificate of birth; except that a new certificate of birth shall not be established if so requested by the court decreeing the adoption, the adoptive parents, or the adopted person.

(b) A certificate of adoption or a certified copy of the decree of adoption entered in a court of competent jurisdiction of any other state or country declaring adopted a child born in the State of Illinois, together with the information necessary to identify the original certificate of birth and to establish the new certificate of birth; except that a new certificate of birth shall not be established if so requested by the court decreeing the adoption, the adoptive parents, or the adopted person.

(c) A request that a new certificate be established and such evidence as required by regulation proving that such person has been legitimatized, or that a court of competent jurisdiction has determined the paternity of such a person.

(d) An affidavit by a physician that he has performed an operation on a person, and that by reason of the operation the sex designation on such person's birth record should be changed. The State Registrar of Vital Records may make any investigation or require any further information he deems necessary.

(2) When a new certificate of birth is established, the actual place and date of birth shall be shown. It shall be substituted for the original certificate of birth:

(a) Thereafter, the original certificate and the evidence of adoption, paternity, legitimation, or sex change shall not be subject to inspection or certifica-

tion except upon order of a court of competent jurisdiction or as provided by regulation.

(b) Upon receipt of notice of annulment of adoption, the original certificate of birth shall be restored to its place in the files, and the new certificate and evidence shall not be subject to inspection or certification except upon order of a court of competent jurisdiction.

(3) If no certificate of birth is on file for the person for whom a new certificate is to be established under this Section, a delayed record of birth shall be filed with the State Registrar of Vital Records as provided in Section 14 or Section 15 of this Act before a new certificate of birth is established, except that when the date and place of birth and parentage have been established in the adoption proceedings, a delayed record shall not be required.

(4) When a new certificate of birth is established by the State Registrar of Vital Records, all copies of the original certificate of birth in the custody of any custodian of permanent local records in this State shall be transmitted to the State Registrar of Vital Records as directed, and shall be sealed from inspection.

APPENDIX "B"*

ILLEGITIMATE CHILDREN: 50 STATE SURVEY

State	Provision for Custody by Father	Provision for Support by Father	Consent Required for Adoption	Provision for Inheritance From Father	Method of Legitimization
Alabama	Father has right against all but the mother, if he is competent to care for the child and evidence shows that it is in the best interest of the child. Lewis v. Crowell, 210 Ala. 199 (1923); Garrett v. Mahaley, 199 Ala. 606 (1917).	Yes—if child is destitute or in necessitous circumstances. Ala. Code Title 34, §89 (1958). Rouse v. State, 184 So. 2d 839 (Ala. App. 1966).	Only by mother unless paternity is established. Ala. Code Title 27, §3 (1958).	Only if child is legitimated. Bagwell v. Powell, 267 Ala. 19 (1957).	Written acknowledgment by father filed in Probate Court. Ala. Code, Title 27, §11 (1958), or intermarriage of parents plus recognition by father Title 27, §10.
Alaska			Only of mother, unless child is legitimated. Alas. Stat. Title 120 §20.10.040 (1967).	Only if child is legitimated. Alas. Stat. Title 13 §13.10.030 (1967).	Intermarriage of parents written acknowledgment by father or court adjudication. Alas. Stat. Ttile 25, §25.20.050 (1967).

			legitimated. Alas. Stat. Title 120 §20.10.040 (1967).	Alas. Stat. Title 13 §13.10.030 (1967).	acknowledgment by father or court adjudication. Alas. Stat. Ttile 25, §25.20.050 (1967).	
Arizona	Child has no right to dwell or reside with the family of his father if the father is married. Ariz. Rev. Stat 1956, §14-206. In awarding custody the court is guided by the best interest of the child, pre-	Yes—Ariz. Rev. Stat. 1956, §14-206.	Both natural parents if father acknowledges child or parentage is established. Ariz. Rev. Stat. 1956, §8-103.	Every child inherits from natural parents. Ariz. Rev. Stat. 1956, §14-206 (b).	Every child is the legitimate child of his natural parents. Ariz. Rev. Stat. 1956, §14-206 (a).	

*Appendix "B" prepared by Robert E. Davison, Assistant Attorney General, State of Illinois.

State	Provision for Custody by Father	Provision for Support by Father	Consent Required for Adoption	Provision for Inheritance From Father	Method of Legitimization
		sumption to natural parents. Ariz. Rev. Stat. 1956, §14-846.			
Arkansas		Yes—Ark. Stat. Ann. §34-706 (1947).	Only by mother unless paternity established. Ark. Stat. Ann. §56-106 (1947).	Child inherits from father only if legitimated. Ark. Stat. Ann. 1969, §61-14 (d).	Intermarriage of parents plus recognition of child. Ark. Stat.Ann. 1969, §61-141 (b).
California	Natural parents have equal right to custody if child is legitimated (adopted) by father. Cal. Civ.	Yes—Cal. Civ. Code §196 (Deering 1961).	Only by mother unless child is legitimated (adopted) by father. Cal. Civ. Code, §224 (Deering 1961).	Child is heir of person who, in writing, acknowledges himself to be the father, but child does not represent	Intermarriage of parents or the father by publicly acknowledging the child as his own, receiving the

		Code, §230 (Deering 1961); Guardianship of Castellanos, 198 Cal. App. 2d 190 (1961). See also In re Guardianship of Smith, 265 P. 2d 888 (Cal. 1954).			the father's kindred. (Cal. Prob. Code, §255 (Deering 1961)), unless legitimated. Cal. Civ. Code, §230 (Deering 1961).	child as such, with the consent of his wife if he is married, into his family, thereby adopts him, and the child is legitimate for all purposes. Cal. Civ. Code, §§215, 230 (Deering 1961).
	Colorado		Yes—Colo. Rev. Stat. 1963, Art. 43-2-1; Ortega v. Portales, 307 P. 2d 193 (Colo.1957).	Only by mother unless child is legitimated according to the laws of any jurisdiction. Colo. Rev. Stat. 1963, Art. 4-1-6.	Child inherits from father if parents intermarry and father recognizes child as his, or father acknowledges child to be his and regularly	Intermarriage of parents plus recognition. Colo. Rev. Stat. 1963, Art. 153-2-8.

State	Provision for Custody by Father	Provision for Support by Father	Consent Required for Adoption	Provision for Inheritance From Father	Method of Legitimization
				contributes to support of child. Colo. Rev. Stat. 1963, Art. 153-2-8.	
Connecticut	The mother of an illegitimate child is the sole guardian Conn. Stat. Ann. 1969, §45-43.	Yes—Conn. Stat. Ann. 1969, §52-442; State v. Wolfe, 239 A. 2d 509 (Conn. 1968).	Only by mother. Conn. Stat. Ann. 1969, §45-61.	Child inherits from father if parents intermarry. Conn. Stat. Ann. 1969, §45-274.	Intermarriage of parents. Conn. Stat. Ann. 1969, §45-274.
Delaware		Yes—Del. Code Ann. 1965, Title 13, §§1326, 1305.	Only by mother. Del. Code Ann. 1965, Title 13, §908.	Child inherits from father only if child is legitimated. Del. Code Ann. 1965, Title 13,	Intermarriage of parents prior to child's birth, or intermarriage after adjudication or acknowl-

				§1304.	edgment of parentage, or by written acknowledgment of both parents, if living, or by father if mother deceased, filed in Prothonotary's Office. Del. Code Ann. 1965, Title 13, §1301.	
Florida	Putative father is not considered a "father" and has no rights to the child. Clements v. Banks, 159 So. 2d 892 (Fla. App. 1964); Fla.	Yes—Fla. Stat. 1965, § 742.031.	Only by mother. Fla. Stat. 1965, § 72.14.	Child inherits from father if father, in writing before a witness, acknowledges himself to be the father. But, child does not rep-	Only by intermarriage of parents. Fla. Stat. 1965, § 742.091.	

State	Provision for Custody by Father	Provision for Support by Father	Consent Required for Adoption	Provision for Inheritance From Father	Method of Legitimization
	Stat. 1965, § 39.01(8). But see Mixon v. Mize, 198 So. 2d 373 (Fla. (App. 1967) (Visitation privileges).			resent father (~~or~~ mother) by inheriting any estate of the parents' kindred unless parents intermarry. Fla. Stat. 1965, § 731.29.	
Georgia	Custody of child, between parents, to be determined by court. Ga. Code Ann. 1964, § 74-107.	Yes—Ga. Code Ann. 1964, § 74-202.	Only by mother. Ga. Code Ann. 1964, § 74-404(3).	None unless child is legitimated. Ga. Code Ann. 1964, § 113-904, § 74-203.	Intermarraige of parents plus recognition, or by petition in the Supreme Court. Ga. Code Ann. 1964, §§ 74-101,.74-103.

Hawaii		Yes—if father acknowledges paternity or court determines paternity. Hawaii Rev. Stat. 1968, §§ 579-4, 577-14.	Only by mother unless child is legitimated. Hawaii Rev. Stat. 1969, § 578-2.	None—Hawaii Rev. Stat. 1968, § 577-14.	Intermarriage of parents. Hawaii Rev. Stat. 1968, § 577-14.
Idaho		Yes—Idaho Code, 1969, § 7-1105.	Only by mother. Idaho Code, 1965, § 16-1504.	Child is heir of the person who, in writing, acknowledges himself to be the father, but does not represent the father's kindred unless legitimated (marriage and acknowledgement, and means	The father by publicly acknowledging the child as his own, receiving the child as such, with the consent of his wife if he is married, into his family, thereby adopts him, and the child is deemed

State	Provision for Support by Father	Provision for Support by Father	Consent Required for Adoption	Provision for Inheritance From Father	Method of Legitimization
				provided in § 16-1510) Idaho Code, 1965, § 14-104.	legitimate. Idaho Code, 1965, § 16-1510.
Illinois	None—Ill. Rev. Stat. 1969, Ch. 106¾, § 62.	Yes, if paternity established. Ill. Rev. Stat. 1969, Ch. 106¾, § 52.	Only by mother. Ill. Rev. Stat. 1969, Ch. 4, § 9.1-8.	None unless child is legitimated or adopted by father. Ill. Rev. Stat. 1969, Ch. 3, § 12.	Intermarriage of parents and acknowledgement by father. Ill. Rev. Stat. 1969, Ch. 3, § 12.
Indiana		Yes—Burns Ind. Stat. 1968, § 3-624.	Only by mother unless paternity established by court and father has	Yes—Child inherits from father when paternity is established. Burns Ind. Stat. 1968,	Intermarriage of parents and acknowledgment by husband. Small v. State, 77

			contributed support and the father's address is known or can be found without expenditure exceeding $5.00. Burns Ind. Stat. 1969, § 3-120.	§ 6-207.	N.E. 2d 578 (1948); Selby v Brenton, 130 N.E. 448 (Ind. App. 1921),
Iowa		Yes—Iowa Code Ann. 1969, § 675.1.	Consent by parent having the care and providing the wants of the child. Iowa Code Ann. 1969, § 600.3.	Child inherits from father if paternity is proven or if father recognizes child. Iowa Probate Act, 1969, § 633.222.	Marriage of parents. In re Clark's Estate, 390 N.W. 13 (Iowa 1940).

State	Provision for Custody by Father	Provision for Support by Father	Consent Required for Adoption	Provision for Inheritance From Father	Method of Legitimization
Kansas	Parent is defined as any person who is liable for the support of a child. Kan. Stat. Ann. 1964, § 38-802.	Yes, if paternity established by court or father admits paternity in court. Kan. Stat. Ann. 1964, § 62-2312.	Only by mother. Kan. Stat. Ann. 1964, § 59-2102.	Child inherits from father if father notoriously or in writing recognizes paternity of child, or paternity is established by court in father's lifetime. Kan. Stat. Ann. 1964, § 59-501.	Intermarriage of parents. Kan. Stat. Ann. 1964, §§ 23-125, 23-126.
Kentucky		Yes—Ky. Rev. Stat. 1964, § 406-011.	Only by mother. Ky. Rev. Stat. 1964, § 199.500.	Child inherits from father only if parents intermarry and father recognizes	Intermarriage of parents and recognition by father. Ky. Rev. Stat. 1964,

				child. Ky. Rev. Stat. 1964, § 391.090.	§ 391.090.
Louisiana	After death of mother, the father is of right the tutor of his natural child if child is acknowledged by father. La. Civ. Code Ann. Art. 256, 202. Compare La. Rev. Stat. Ann. 1965, § 9:404.	Yes—Compare La. Civ. Code Ann. 1965, Art. 240, with Caldwell v. Headrick, 197 So. 2d 363 (La. 1967).	Only by mother. La. Rev. Stat. Ann. 1965, § 9:404.	None—La. Civ. Code Ann. 1965, Art. 920.	Intermarriage of parents. La. Civ. Code Ann. 1965, Art. 198. Illegitimate child has no family even when legally acknowledged. Compare La. Civ. Code Ann. 1965, Arts. 202, 203, 238.
Maine		Yes—Me. Rev. Stat. Ann. 1967, Title 19, §§	Only by mother. Me. Rev. Stat. Ann. 1967,	Child inherits from father if father adopts	Intermarriage of parents or father adopts child

State	Provision for Custody by Father	Provision for Support by Father	Consent Required for Adoption	Provision for Inheritance From Father	Method of Legitimization
		271, 273.	Title 19, § 532.	the child into his family or acknowledges the child in writing before notary public. Me. Rev. Stat. Ann. 1965, Title 18, § 1003.	into his family or acknowledges, in writing, the child before a notary public. Me. Rev. Stat. Ann. 1965, Title 18, § 1003.
Maryland	Custody of child may be determined by court, for the general welfare and best interest of the child. Md. Ann. Code 1957, Art. 16, § 66 H (b).	Yes—Md. Ann. Code 1957, Art. 16, § 66 H (a).	Only by mother unless child is legitimated according to the laws of any jurisdiction. Md. Ann. Code 1957, Art. 16, § 74.	Child inherits from father if § 1-208 (Laws of Md. 1969) is satisfied. Laws of Md. 1969, §§ 1-209, 3-103.	Child is deemed of his father if paternity established, or written acknowledgment or notorious recognition by father or intermarriage and acknowledge-

					ment. Laws of Md. 1969, § 1-208.
Massachusetts	Custody of child may be determined by court. Mass. Gen. Laws Ann. 1958, Ch. 273, § 14.	Yes—Mass. Gen. Laws Ann. 1958, Ch. 273, § 15.	Only by mother. Mass. Gen. Laws Ann. 1970, Ch. 210, § 2.	Child inherits from father if legitimated or if paternity is established. Mass. Gen. Laws Ann. 1958, Ch. 190, § 7.	Intermarriage of parents plus acknowledgment. Mass. Gen. Laws Ann. 1958, Ch. 190, § 7.
Michigan	Primary right to custody in mother, secondary in father, but both subordinate to welfare of child. In re T., 154 N.W. 2d 27 (Mich. 1967).	Yes—Mich. Civ. Law Ann. 1968, § 722.712.	Only by mother. Mich. Civ. Law Ann. 1968, § 710.3.	None unless child is legitimated. Mich.Civ. Law Ann. 1968, §§ 27.3178(151), 27.3178(153).	Intermarriage of parents or written acknowledgment. Mich. Civ. Law Ann. 1968, § 702.83.

State	Provision for Custody by Father	Provision for Support by Father	Consent Required for Adoption	Provision for Inheritance From Father	Method of Legitimization
Minnesota	Father may be awarded custody of child where mother rejects child and father is competent to care for the child, but the right to custody is subordinated to the best interest of the child. In re Brennan, 134 N.W. 2d 126 (Minn. 1965).	Yes—Minn. Stat. Ann. 1971, § 257.23.	Only by mother. Minn. Stat. Ann. 1971, § 259.24. Putative father who appears at adoption proceeding and acknowledges paternity is entitled to be heard. In re Brennan, 134 N.W. 2d 126 (Minn. 1965).	Child inherits from father if father declares paternity in writing before a witness, but child shall not inherit from the kindred of either parent. Minn. Stat. Ann. 1971, § 525.172.	Intermarriage of parents. Minn. Stat. Ann. 1971, § 517.19.
Mississippi	The putative father who is able to take care of and	Yes—Miss. Code 1962, §§ 373-01, 383-04.	Putative father is not deemed to be a parent for	Child inherits from father only if legilti-	Intermarraige of parents and acknowledg-

	support the child is entitled to the childs custody after the death of the mother. Aycock v. Hampton, 36 So. 245 (Miss. 1904).		purposes of adoption. Miss. Code 1962, § 1269-03.	mated. Miss. Code 1962, § 474.	ment. Miss. Code 1962, § 474.
Missouri	Parents are presumed to be fit to assume custody, mother has primary right. In re Richard, 280 S.W. 2d 466 (Mo. App. 1955).	Yes—Vernons Mo. Stat. Ann. 1965, § 559.353.	Only by mother. Vernons Mo. Stat. Ann. 1965, § 453.030.	Child inherits from father only if child is legitimated. Vernons Mo. Stat. Ann. 1965, § 474.070.	Intermarriage of parents. (Vernons Mo. Stat. Ann. 1965, § 474.070) plus recognition. T.v.T. 446 S.W. 2d 795 (Mo. App. 1969).
Montana		Yes when paternity is established.	Only by mother. Mont. Rev.	Child inherits from father who,	Intermarriage of parents. Mont.

State	Provision for Custody by Father	Provision for Support by Father	Consent Required for Adoption	Provision for Inheritance From Father	Method of Legitimization
		Mont. Rev. Code 1970, § 94-9907.	Code 1970, § 61-205.	in writing, before a witness acknowledges the child, but child does not represent his parents by inheriting from their kindred unless the child is legitimated. Mont. Rev. Code 1970, § 91-404.	Rev. Code 1970, § 61-123.
Nebraska	Child, on death of mother, may be placed in the care of the putative father. Dodge	Yes if paternity established by court or by father's acknowledgment. Neb.	Only by mother. Neb. Rev. Stat. 1968, § 43-104.	Child inherits from father if father acknowledges child in writing before	Intermarriage of parents and acknowledgment. Neb. Rev. Stat. 1968, § 13-

	County v. Kemnitz, 49 N.W. 226 (Neb. 1891).	Rev. Stat. 1968, §§ 13-102, 13-109.		witness, but child doesn't represent parents from their kindred unless legitimated. Neb. Rev. Stat. 1968, § 30-109.	109.
Nevada		Yes—Nev. Rev. Stat. 1967, § 126.030.	Only by mother. Nev. Rev. Stat. 1967, § 127.040.	Child inherits from father who acknowledges child in writing, before a witness. Nev. Rev. Stat. 1967, § 134.170.	Intermarriage of parents. Nev. Rev. Stat. 1967, § 122.140.
New Hampshire		Yes—N.H. Rev. Stat. Ann. 1964, § 168:4.	Only by mother. N.H. Rev. Stat. Ann. 1968, Ch. 641:3.	None unless child is legitimated. N.H. Rev. Stat. Ann.	Intermarriafie of parents plus recognition. N.H. Rev.

State	Provision for Custody by Father	Provision for Support by Father	Consent Required for Adoption	Provision for Inheritance From Father	Method of Legitimization
				1964, Chs. 457:42, 561:4.	Stat. Ann. 1964, Ch. 457:42.
New Jersey	Father has no right to custody of child. N.J. Stat. Ann. 1960, Title 9:2-19 and 9:16-1. Putative father may question custody of child and has a greater right to custody than a stranger. Guardianship of S. 237 A. 2d 652 (N.J. Sup. 1967).	Yes—N.J. Stat. Ann. 1960, Title 9:16-2.	Only by mother. N.J. Stat. Ann. 1960, Title 9:3-19 and 9:3-18.	None unless child is legitimated. N.J. Stat. Ann. 1960, Title 3A:4-7.	Intermarriage of parents and recognition. N.J. Stat. Ann. 1960, Title 9:15-1.

New Mexico	Putative father has standing to litigate custody of child. Torres v. Gonzales, 450 P. 2d 921 (N.M. 1969).	Yes—N.M. Stat. 1967, Ch. 22-4-2.	Only by mother. N.M. Stat. 1967, Ch. 22-2-5.	Child inherits from father when father recognizes the child in writing. N.M. Stat. 1967, Ch. 29-1-18.	Intermarriage of parents. N.M. Stat. 1967, Ch. 29-1-20.
New York	On death of mother, the natural father is entitled to custody of the child if he is a fit person. Fierro v. Ljubicich, 165 N.Y. S. 2d 290 (1957).	Yes—Storm v. None, 291 N.Y. S. 2d 515 (1968).	Only by mother. N.Y. Dom. Rel. Law, § 111 (McKinney 1964).	Child inherits from father if court, during lifetime of father, makes an order of filiation declaring paternity. N.Y. Estate and Trust Law, § 4-1.2 (2) (McKinney 1964).	Intermarriage of parents. N.Y. Dom. Rel. Law, § 24 (McKinney 1964).

State	Provision for Custody by Father	Provision for Support by Father	Consent Required for Adoption	Provision for Inheritance From Father	Method of Legitimization
North Carolina	N.C. Gen. Stat. 1969, § 48-4 provides for adoption of child by putative father by way of petition in Superior Court.	Yes—N.C. Gen. Stat. 1969, §§ 49-2, 49-15.	Only by mother. N.C. Gen. Stat. 1969, § 48-6.	Child inherits from father if child is legitimated. N.C. Gen. Stat. 1969, § 49-11.	Intermarriage of parents § 49-12. Verified written petition by father in superior court praying that child be legitimated. The mother and child are necessary parties. N.C. Gen. Stat. 1969, § 49-10.
North Dakota	Mother has sole custody of child. N.D. Code 1960, Titles 14-09-05, 32-36-35.	Yes—N.D. Code 1960, Title 32-36-01; N.D. Code 1969, Title 56-01-	Only by mother. N.D. Code 1960, Title 14-11-04. Notice of adoption	Every child inherits from natural parents. N.D. Code, 1969, Title 56-01-	Intermarriage of parents. N.D. Code, 1960, Title 14-09-02.

State	Provision for Custody by Father	Provision for Support by Father	Consent Required for Adoption	Provision for Inheritance From Father	Method of Legitimization
North Carolina	N.C. Gen. Stat. 1969, § 48-4 provides for adoption of child by putative father by way of petition in Superior Court.	Yes—N.C. Gen. Stat. 1969, §§ 49-2, 49-15.	Only by mother. N.C. Gen. Stat. 1969, § 48-6.	Child inherits from father if child is legitimated. N.C. Gen. Stat. 1969, § 49-11.	Intermarriage of parents § 49-12. Verified written petition by father in superior court praying that child be legitimated. The mother and child are necessary parties. N.C. Gen. Stat. 1969, § 49-10.
North Dakota	Mother has sole custody of child. N.D. Code 1960, Titles 14-09-05, 32-36-35.	Yes—N.D. Code 1960, Title 32-36-01; N.D. Code 1969, Title 56-01-	Only by mother. N.D. Code 1960, Title 14-11-04. Notice of adoption	Every child inherits from natural parents. N.D. Code, 1969, Title 56-01-	Intermarriage of parents. N.D. Code, 1960, Title 14-09-02.

		05.	hearing must be given to father who acknowledges paternity or against whom paternity is adjudicated. N.D. Code, 1961, Title 14-11-10.	05; In re Jensen, 162 N.W. 2d 861 (N.D. 1968).		
Ohio	See legitimigation Page's Ohio Rev. Code, 1960, § 2105.18. When the father publicly acknowledges the child, contributes to its support and is a proper person he is entitled to	Yes—Pages Ohio Rev. Code, 1960, § 3111.17.	Only by mother. Pages Ohio Rev. Code, 1969, § 1307.06.	None, unless child is legitimated. Pages Ohio Rev. Code, 1969, §§ 2105.17, 2105.18.	Intermarriage of parents plus acknowledgment, or father may file an application in probate court, acknowledging the child as his and upon consent of mother, or if she is de-	

State	Provision for Custody by Father	Provision for Support by Father	Consent Required for Adoption	Provision for Inheritance From Father	Method of Legitimization
	custody when the mother relinquishes or abandons control of the child. French v. Catholic Community League, 44 N.E. 2d 113 (Ohio App. 1942).				ceased, the consent of the person or agency having custody or the court having jurisdiction over custody, the court if satisfied tha the petitioner is the father and that the establishment of such relationship is for the best interest of the child, may enter the fact upon the courts journal and child is deemed

					legitimate. Page's Ohio Rev. Code, 1960, § 2105-18.
Oklahoma	Determination of custody may be determined by court. Ex parte Hendrix, 100 P. 2d 444 (1941).	Yes—Okla. Stat. Ann. 1961, Title 10, § 78. Plunkett v. Atkins, 371 P. 2d 727 (Okla. 1962).	Only by mother. Okla. Stat. Ann. 1961, Title 10, § 606.	Child inherits from father who, in writing, before a witness acknowledges the child, but child does not represent the father (or mother) by inheriting from his kindred unless parents intermarry and father acknowledges the child. Okla. Stat. Ann. 1961,	Father, by publicly acknowledging the child, receiving the child into his home, with the consent of his wife if married, and otherwise treating the child as legitimate, adopts the child and child is for all purposes legitimate. Okla. Stat. Ann. 1961, Title 10, § 2.

State	Provision for Custody by Father	Provision for Support by Father	Consent Required for Adoption	Provision for Inheritance From Father	Method of Legitimization
				Title 84, § 215.	
Oregon	Custody may be determined by the county public welfare departments. Ore. Rev. Stat. 1965, § 418.015.	Yes—Ore. Rev. Stat. 1965, §§ 109.220, 109.155.	By both parents if they intermarry or if paternity is established by § 109.070. Ore. Rev. Stat. 1965, § 109.080.	Child inherits from father if paternity is established or if father acknowledges the child, in writing. Ore. Rev. Stat. 1965, § 112.105.	Legal status between person and his parents and kindred are the same for all persons whether or not the parents have been married. Ore. Rev. Stat. 1965, §§ 109.060, 109.070.

Pennsylvania	Father is entitled to custody if mother is deceased, if he is a suitable person. Human v. Hyman, 63 A. 2d 447 (Pa. 1949).	Yes—Purdon's Pa. Stat. Ann. 1963, Title 18, § 4732.	Only by mother. Purdon's Pa. Stat. Ann. 1963, Title 1, § 2 (c).	Child inherits from father only if parents intermarry. Purdon's Pa. Stat. Ann. 1963, Title 20, § 1.7.	Lawful wedlock of parents plus cohabitation. Purdon's Pa. Stat. Ann. 1963, Title 48, § 167.
Rhode Island	Court may place child in custody of person other than the mother, welfare of child is paramont. In re Hope, 34 A. 994 (R.I. 1896).	Yes—R.I. Gen. Law 1956, § 15-8-10.	Only by mother. Compare R.I. Gen. Law 1956, § 15-7-5 with Sklaroff v. Stevens, 120 A. 2d 694 (R.I. 1956).	None unless child is legitimated. R.I. Gen. Laws, 1956, § 33-1-8.	Intermarry of parents plus acknowledgment. Compare R.I. Gen. Laws, 1956, §15-8-21 with § 33-1-8.

State	Provision for Custody by Father	Provision for Support by Father	Consent Required for Adoption	Provision for Inheritance From Father	Method of Legitimization
South Carolina		Father must provide child with necessaries of life. S.C. Code, 1964, § 20-303.	Only by mother. S.C. Code, 1964, § 10-2587.7.	None, unless child is legitimated. S.C. Code, 1964, § 19-53, Walker v. Walker, 274 F. 2d 425 (4th Cir. 1960).	Intermarriage of parents. S.C. Code, 1964, § 20-5.1.
South Dakota		Yes—S.D. Com. Laws, 1967, § 25-8-2.	Only consent of mother. S.D. Com. Laws, 1967, § 25-6-4.	Child inherits from father who acknowledges child, in writing before a witness, but child doesn't represent father by inheriting from his kindred unless parents have in-	Father by publicly acknowledging child, receiving the child into his family, with consent of his wife if married, and otherwise treating the child as legitimate, adopts the

				termarried and acknowleged child, or adopts child. S.D. Com. Laws, 1967, § 29-1-15.	child and child is legitimate for all purposes. S.D. Com. Laws, 1967, § 25-6-1.
Tennessee		Yes—Tenn. Code, 1956, § 36-223.	Only by mother. Tenn Code, 1956, § 36-111.	Child inherits from father if paternity is established or if father makes written petition. Tenn. Code, 1956, §§ 36-234, 36-302, 36-306.	Intermarriage of parents. Tenn. Code, 1956, § 36-307.
Texas	No. Home of the Holy Infancy v. Kaska, 397 S.W. 2d 208 (Tex. 1965).	No. Home of the Holy Infancy v. Kaska, 397 S.W. 2d 208 (Tex. 1965).	Only by mother. Vernon's Ann. Tex. Stat. 1955, Art. 46a, § 6(d).	Child inherits from father only if child is legitimated. Vernon's Tex. Prob. Code, 1955, § 42.	Intermarriage of parents. Vernon's Ann. Tex. Prob. Code, 1955, § 42.

State	Provision for Custody by Father	Provision for Support by Father	Consent Required for Adoption	Provision for Inheritance From Father	Method of Legitimization
Utah	Father has no right to custody if mother is living and wishes to retain custody unless, upon petition in court, it appears that mother is not suitable to retain custody. Utah Code Ann., 1966, § 77-60-12.	Yes—Utah Code Ann. 1966, § 77-60-7.	Consent by each parent having rights to the child. Utah Code Ann. 1966, § 78-30-4.	Child inherits from father who acknowledges the child. Utah Code Ann. 1966, § 74-4-10.	Father, by publicly acknowledging the child, receiving the child, with consent of his wife if married, and treating the child as legitimated, adopts the child and the child is legitimate for all purposes. Utah Code Ann. 1966, § 78-30-12.

Vermont	Mother is guardian of child until another is appointed. Vt. Stat. Ann. 1967, Title 14, § 2643.	Yes—Vt. Stat. Ann. 1967, Title 15, § 339.	Only by mother. Vt. Stat. Ann. 1967, Title 15, § 435.	Child inherits from father if paternity is established or father openly and notoriously claims the child. Vt. Stat. Ann. 1967, Title 14, § 533(b).	Intermarriage of parents plus recognition by father. Vt. Stat. Ann. 1967, Title 14, § 554.
Virginia	Court may award custody to father. Hayes v. Strauss, 144 S.E. 432 (Va. 1928).	Yes—Va. Code, 1968, § 20.61-1.	Only by mother. Va. Code, 1968, § 63.1-225.	None—Va. Code, 1968, § 64.1-5.	Intermarriage of parents plus recognition by father. Va. Code, 1968, § 64.1-6.
Washington	Mother is awarded custody of child if she is suitable, if not the court	Yes—Wash. Rev. Code Ann. 1967, § 26.24.090.	Only by mother. Wash. Rev. Code Ann. 1967, § 26.32.030.	Child inherits from father if parents intermarry or father ack-	Intermarriage of parents. Wash. Rev. Code Ann. 1967, § 26.04.060.

State	Provision for Custody by Father	Provision for Support by Father	Consent Required for Adoption	Provision for Inheritance From Father	Method of Legitimization
	may deliver custody to any reputable person, including the father, charitable or state institution. Wash. Rev. Code Ann. 1967, §§ 26.24.190. Upon death of mother, putative father, if fit and welfare of child permits, is entitled to custody. In re Moore's Estate, 415 P. 2d 653 (Wash. 1966).			nowledges the child in writing. Wash. Rev. Code Ann. 1967, § 11.04.081.	

West Virginia		Yes—W. Va. Code, 1969, § 48-7-4.	Only of mother. W. Va. Code, 1969, § 48-4-1.	None, unless child is legitimated. W. Va. Code, 1969, § 42-1-5. Pace v. Celebrezze, 243 F. Supp. 317 (S.D. W. Va. 1965).	Intermarriage of parents. W. Va. Code, 1969, § 42-1-6.
Wisconsin	The father has right to custody against all but the mother. In re Aronson, 58 N.W. 2d 553 (Wis. 1953).	Yes—Wis. Stat. Ann. 1957, § 52.37.	Only of mother. Wis. Stat. Ann. 1957, § 48.84. If father voluntary appears at proceeding he will be heard. In re Aronson, 58 N.W. 2d 553 (Wis. 1953).	Child inherits from father if father acknowledges the child, in writing before witness or paternity established, or if father admits paternity in open court. Wis. Stat. Ann. 1957, § 237.06.	Intermarriage of parents. Wis. Stat. Ann. 1957, § 237.06.

State	Provision for Custody by Father	Provision for Support by Father	Consent Required for Adoption	Provision for Inheritance From Father	Method of Legitimization
Wyoming		Yes—Wyo. Stat. 1963, § 14-60.	Only by mother. Wyo. Stat. 1963, § 1-710.1.	Child inherits from father only if legitimated. Wyo. Stat. 1963, § 2-44.	Intermarriage of parents plus recognized by father. Wyo. Stat. 1963, § 2-44.

Syllabus

STANLEY v. ILLINOIS

CERTIORARI TO THE SUPREME COURT OF ILLINOIS

No. 70-5014. Argued October 19, 1971—Decided April 3, 1972

Petitioner, an unwed father whose children, on the mother's death, were declared state wards and placed in guardianship, attacked the Illinois statutory scheme as violative of equal protection. Under that scheme the children of unmarried fathers, upon the death of the mother, are declared dependents without any hearing on parental fitness and without proof of neglect, though such hearing and proof are required before the State assumes custody of children of married or divorced parents and unmarried mothers. The Illinois Supreme Court, holding that petitioner could properly be separated from his children upon mere proof that he and the dead mother had not been married and that petitioner's fitness as a father was irrelevant, rejected petitioner's claim. *Held:*

1. Under the Due Process Clause of the Fourteenth Amendment petitioner was entitled to a hearing on his fitness as a parent before his children were taken from him. Pp. 647-658.

(a) The fact that petitioner can apply for adoption or for custody and control of his children does not bar his attack on the dependency proceeding. Pp. 647-649.

(b) The State cannot, consistently with due process requirements, merely presume that unmarried fathers in general and petitioner in particular are unsuitable and neglectful parents. Parental unfitness must be established on the basis of individualized proof. See *Bell* v. *Burson*, 402 U. S. 535. Pp. 649-658.

2. The denial to unwed fathers of the hearing on fitness accorded to all other parents whose custody of their children is challenged by the State constitutes a denial of equal protection of the laws. P. 658.

45 Ill. 2d 132, 256 N. E. 2d 814, reversed and remanded.

WHITE, J., delivered the opinion of the Court, in which BRENNAN, STEWART, and MARSHALL, JJ., joined, and in which (as to Parts I and II) DOUGLAS, J., joined. BURGER, C. J., filed a dissenting opinion, in which BLACKMUN, J., joined, *post*, p. 659. POWELL and REHNQUIST, JJ., took no part in the consideration or decision of the case.

Patrick T. Murphy argued the cause and filed a brief for petitioner.

Morton E. Friedman, Assistant Attorney General of Illinois, argued the cause for respondent. With him on the brief were *William J. Scott*, Attorney General, and *Joel M. Flaum*, First Assistant Attorney General.

Jonathan Weiss and *E. Judson Jennings* filed a brief for the Center on Social Welfare Policy and Law as *amicus curiae* urging reversal.

Calvin Sawyier and *Richard L. Mandel* filed a brief for the Child Care Association of Illinois, Inc., as *amicus curiae*.

MR. JUSTICE WHITE delivered the opinion of the Court.

Joan Stanley lived with Peter Stanley intermittently for 18 years during which time they had three children.[1] When Joan Stanley died, Peter Stanley lost not only her but also his children. Under Illinois law the children of unwed fathers become wards of the State upon the death of the mother. Accordingly, upon Joan Stanley's death, in a dependency proceeding instituted by the State of Illinois, Stanley's children[2] were declared wards of the State and placed with court-appointed guardians. Stanley appealed, claiming that he had never been shown to be an unfit parent and that since married fathers and unwed mothers could not be deprived of their children without such a showing, he had been deprived of the equal protection of the laws guaranteed him by the Fourteenth Amendment. The Illinois Supreme Court accepted the fact that Stanley's own unfitness had not been established but rejected the equal protection claim, holding that Stanley could properly be separated from his children upon proof of the single fact that he and the dead mother

[1] Uncontradicted testimony of Peter Stanley, App. 22.

[2] Only two children are involved in this litigation.

had not been married. Stanley's actual fitness as a father was irrelevant. *In re Stanley*, 45 Ill. 2d 132, 256 N. E. 2d 814 (1970).

Stanley presses his equal protection claim here. The State continues to respond that unwed fathers are presumed unfit to raise their children and that it is unnecessary to hold individualized hearings to determine whether particular fathers are in fact unfit parents before they are separated from their children. We granted certiorari, 400 U. S. 1020 (1971), to determine whether this method of procedure by presumption could be allowed to stand in light of the fact that Illinois allows married fathers—whether divorced, widowed, or separated—and mothers—even if unwed—the benefit of the presumption that they are fit to raise their children.

I

At the outset we reject any suggestion that we need not consider the propriety of the dependency proceeding that separated the Stanleys because Stanley might be able to regain custody of his children as a guardian or through adoption proceedings. The suggestion is that if Stanley has been treated differently from other parents, the difference is immaterial and not legally cognizable for the purposes of the Fourteenth Amendment. This Court has not, however, embraced the general proposition that a wrong may be done if it can be undone. Cf. *Sniadach* v. *Family Finance Corp.*, 395 U. S. 337 (1969). Surely in the case before us if there is delay between the doing and the undoing, petitioner suffers from the deprivation of his children and the children suffer from uncertainty and dislocation.

It is clear, moreover, that Stanley does not have the means at hand promptly to erase the adverse consequences of the proceeding in the course of which his children were declared wards of the State. It is first

urged that Stanley could act to adopt his children. But under Illinois law, Stanley is treated not as a parent but as a stranger to his children, and the dependency proceeding has gone forward on the presumption that he is unfit to exercise parental rights. Insofar as we are informed, Illinois law affords him no priority in adoption proceedings. It would be his burden to establish not only that he would be a suitable parent but also that he would be the most suitable of all who might want custody of the children. Neither can we ignore that in the proceedings from which this action developed, the "probation officer," see App. 17, the assistant state's attorney, see *id.*, at 29–30, and the judge charged with the case, see *id.*, at 16–18, 23, made it apparent that Stanley, unmarried and impecunious as he is, could not now expect to profit from adoption proceedings.[8] The Illinois Supreme Court apparently recognized some or all of these considerations, because it did not suggest that Stanley's case was undercut by his failure to petition for adoption.

Before us, the State focuses on Stanley's failure to petition for "custody and control"—the second route by which, it is urged, he might regain authority for his children. Passing the obvious issue whether it would be futile or burdensome for an unmarried father—without funds and already once presumed unfit—to petition for custody, this suggestion overlooks the fact that legal custody is not parenthood or adoption. A person appointed guardian in an action for custody and control is subject to removal at any time without such

[8] The Illinois Supreme Court's opinion is not at all contrary to this conclusion. That court said: "[T]he trial court's comments clearly indicate the court's willingness to consider a *future* request by the father for *custody and guardianship*." 45 Ill. 2d 132, 135, 256 N. E. 2d 814, 816. (Italics added.) See also the comment of Stanley's counsel on oral argument: "If Peter Stanley could have adopted his children, we would not be here today." Tr. of Oral Arg. 7.

cause as must be shown in a neglect proceeding against a parent. Ill. Rev. Stat., c. 37, § 705–8. He may not take the children out of the jurisdiction without the court's approval. He may be required to report to the court as to his disposition of the children's affairs. Ill. Rev. Stat., c. 37, § 705–8. Obviously then, even if Stanley were a mere step away from "custody and control," to give an unwed father only "custody and control" would still be to leave him seriously prejudiced by reason of his status.

We must therefore examine the question that Illinois would have us avoid: Is a presumption that distinguishes and burdens all unwed fathers constitutionally repugnant? We conclude that as a matter of due process of law, Stanley was entitled to a hearing on his fitness as a parent before his children were taken from him and that by denying him a hearing and extending it to all other parents whose custody of their children is challenged the State denied Stanley the equal protection of the laws guaranteed by the Fourteenth Amendment.

II

Illinois has two principal methods of removing nondelinquent children from the homes of their parents. In a dependency proceeding it may demonstrate that the children are wards of the State because they have no surviving parent or guardian. Ill. Rev. Stat., c. 37, §§ 702–1, 702–5. In a neglect proceeding it may show that children should be wards of the State because the present parent(s) or guardian does not provide suitable care. Ill. Rev. Stat., c. 37, §§ 702–1, 702–4.

The State's right—indeed duty—to protect minor children through a judicial determination of their interests in a neglect proceeding is not challenged here. Rather, we are faced with a dependency statute that empowers state officials to circumvent neglect proceedings

on the theory that an unwed father is not a "parent" whose existing relationship with his children must be considered.[4] "Parents," says the State, "means the father and mother of a legitimate child, or the survivor of them, or the natural mother of an illegitimate child, and includes any adoptive parent," Ill. Rev. Stat., c. 37, § 701–14, but the term does not include unwed fathers. Under Illinois law, therefore, while the children of all parents can be taken from them in neglect proceedings, that is only after notice, hearing, and proof of such unfitness as a parent as amounts to neglect, an unwed father is uniquely subject to the more simplistic dependency proceeding. By use of this proceeding, the State, on showing that the father was not married to the mother, need not prove unfitness in fact, because it is presumed at law. Thus, the unwed father's claim of parental qualification is avoided as "irrelevant."

In considering this procedure under the Due Process Clause, we recognize, as we have in other cases, that due process of law does not require a hearing "in every conceivable case of government impairment of private interest." *Cafeteria Workers* v. *McElroy*, 367 U. S. 886, 894 (1961). That case explained that "[t]he very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation" and firmly established that "what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental

[4] Even while refusing to label him a "legal parent," the State does not deny that Stanley has a special interest in the outcome of these proceedings. It is undisputed that he is the father of these children, that he lived with the two children whose custody is challenged all their lives, and that he has supported them.

action." *Id.*, at 895; *Goldberg* v. *Kelly*, 397 U. S. 254, 263 (1970).

The private interest here, that of a man in the children he has sired and raised, undeniably warrants deference and, absent a powerful countervailing interest, protection. It is plain that the interest of a parent in the companionship, care, custody, and management of his or her children "come[s] to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements." *Kovacs* v. *Cooper*, 336 U. S. 77, 95 (1949) (Frankfurter, J., concurring).

The Court has frequently emphasized the importance of the family. The rights to conceive and to raise one's children have been deemed "essential," *Meyer* v. *Nebraska*, 262 U. S. 390, 399 (1923), "basic civil rights of man," *Skinner* v. *Oklahoma*, 316 U. S. 535, 541 (1942), and "[r]ights far more precious . . . than property rights," *May* v. *Anderson*, 345 U. S. 528, 533 (1953). "It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." *Prince* v. *Massachusetts*, 321 U. S. 158, 166 (1944). The integrity of the family unit has found protection in the Due Process Clause of the Fourteenth Amendment, *Meyer* v. *Nebraska*, *supra*, at 399, the Equal Protection Clause of the Fourteenth Amendment, *Skinner* v. *Oklahoma*, *supra*, at 541, and the Ninth Amendment, *Griswold* v. *Connecticut*, 381 U. S. 479, 496 (1965) (Goldberg, J., concurring).

Nor has the law refused to recognize those family relationships unlegitimized by a marriage ceremony. The Court has declared unconstitutional a state statute denying natural, but illegitimate, children a wrongful-death action for the death of their mother, emphasizing that

such children cannot be denied the right of other children because familial bonds in such cases were often as warm, enduring, and important as those arising within a more formally organized family unit. *Levy* v. *Louisiana*, 391 U. S. 68, 71–72 (1968). "To say that the test of equal protection should be the 'legal' rather than the biological relationship is to avoid the issue. For the Equal Protection Clause necessarily limits the authority of a State to draw such 'legal' lines as it chooses." *Glona* v. *American Guarantee Co.*, 391 U. S. 73, 75–76 (1968).

These authorities make it clear that, at the least, Stanley's interest in retaining custody of his children is cognizable and substantial.

For its part, the State has made its interest quite plain: Illinois has declared that the aim of the Juvenile Court Act is to protect "the moral, emotional, mental, and physical welfare of the minor and the best interests of the community" and to "strengthen the minor's family ties whenever possible, removing him from the custody of his parents only when his welfare or safety or the protection of the public cannot be adequately safeguarded without removal . . . ." Ill. Rev. Stat., c. 37, § 701–2. These are legitimate interests well within the power of the State to implement. We do not question the assertion that neglectful parents may be separated from their children.

But we are here not asked to evaluate the legitimacy of the state ends, but, rather, to determine whether the means used to achieve these ends are constitutionally defensible. What is the state interest in separating children from fathers without a hearing designed to determine whether the father is unfit in a particular disputed case? We observe that the State registers no gain towards its declared goals when it separates children from the custody of fit parents. Indeed, if Stanley is a

fit father, the State spites its own articulated goals when it needlessly separates him from his family.

In *Bell* v. *Burson*, 402 U. S. 535 (1971), we found a scheme repugnant to the Due Process Clause because it deprived a driver of his license without reference to the very factor (there fault in driving, here fitness as a parent) that the State itself deemed fundamental to its statutory scheme. Illinois would avoid the self-contradiction that rendered the Georgia license suspension system invalid by arguing that Stanley and all other unmarried fathers can reasonably be presumed to be unqualified to raise their children.[5]

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[5] Illinois says in its brief, at 21–23.

"[T]he only relevant consideration in determining the propriety of governmental intervention in the raising of children is whether the best interests of the child are served by such intervention.

"In effect, Illinois has imposed a statutory presumption that the best interests of a particular group of children necessitates some governmental supervision in certain clearly defined situations. The group of children who are illegitimate are distinguishable from legitimate children not so much by their status at birth as by the factual differences in their upbringing. While a legitimate child usually is raised by both parents with the attendant familial relationships and a firm concept of home and identity, the illegitimate child normally knows only one parent—the mother. . . .

". . . The petitioner has premised his argument upon particular factual circumstances—a lengthy relationship with the mother . . . a familial relationship with the two children, and a general assumption that this relationship approximates that in which the natural parents are married to each other.

". . . Even if this characterization were accurate (the record is insufficient to support it) it would not affect the validity of the statutory definition of parent. . . . The petitioner does not deny that the children are illegitimate. The record reflects their natural mother's death. Given these two factors, grounds exist for the State's intervention to ensure adequate care and protection for these children. This is true whether or not this particular petitioner assimilates all or none

It may be, as the State insists, that most unmarried fathers are unsuitable and neglectful parents.[6] It may also be that Stanley is such a parent and that his children should be placed in other hands. But all unmarried fathers are not in this category; some are wholly suited to have custody of their children.[7] This much the State

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of the normal characteristics common to the classification of fathers who are not married to the mothers of their children."

See also Illinois' Brief 23 ("The comparison of married and putative fathers involves exclusively factual differences. The most significant of these are the presence or absence of the father from the home on a day-to-day basis and the responsibility imposed upon the relationship"), *id.*, at 24 (to the same effect), *id.*, at 31 (quoted below in n. 6), *id.*, at 24–26 (physiological and other studies are cited in support of the proposition that men are not naturally inclined to childrearing), and Tr. of Oral Arg. 31 ("We submit that both based on history or [*sic*] culture the very real differences . . . between the married father and the unmarried father, in terms of their interests in children and their legal responsibility for their children, that the statute here fulfills the compelling governmental objective of protecting children . . .").

[6] The State speaks of "the general disinterest of putative fathers in their illegitimate children" (Brief 8) and opines "In most instances, the natural father is a stranger to his children." Brief 31.

[7] See *In re Mark T.*, 8 Mich. App. 122, 154 N. W. 2d 27 (1967). There a panel of the Michigan Court of Appeals in unanimously affirming a circuit court's determination that the father of an illegitimate son was best suited to raise the boy, said:

"The appellants' presentation in this case proceeds on the assumption that placing Mark for adoption is inherently preferable to rearing by his father, that uprooting him from the family which he knew from birth until he was a year and a half old, secretly institutionalising him and later transferring him to strangers is so incontrovertibly better that no court has the power even to consider the matter. Hardly anyone would even suggest such a proposition if we were talking about a child born in wedlock.

"We are not aware of any sociological data justifying the assumption that an illegitimate child reared by his natural father is less likely to receive a proper upbringing than one reared by his natural father who was at one time married to his mother, or that the

readily concedes, and nothing in this record indicates that Stanley is or has been a neglectful father who has not cared for his children. Given the opportunity to make his case, Stanley may have been seen to be deserving of custody of his offspring. Had this been so, the State's statutory policy would have been furthered by leaving custody in him.

Carrington v. *Rash*, 380 U. S. 89 (1965), dealt with a similar situation. There we recognized that Texas had a powerful interest in restricting its electorate to bona fide residents. It was not disputed that most servicemen stationed in Texas had no intention of remaining in the State; most therefore could be deprived of a vote in state affairs. But we refused to tolerate a blanket exclusion depriving all servicemen of the vote, when some servicemen clearly were bona fide residents and when "more precise tests," *id.*, at 95, were available to distinguish members of this latter group. "By forbidding a soldier ever to controvert the presumption of nonresidence," *id.*, at 96, the State, we said, unjustifiably effected a substantial deprivation. It viewed people one-dimensionally (as servicemen) when a finer perception could readily have been achieved by assessing a serviceman's claim to residency on an individualized basis.

> "We recognize that special problems may be involved in determining whether servicemen have actually acquired a new domicile in a State for franchise purposes. We emphasize that Texas is free to take reasonable and adequate steps, as have other States, to see that all applicants for the vote actually fulfill the requirements of bona fide residence. But [the challenged] provision goes beyond such rules.

stigma of illegitimacy is so pervasive it requires adoption by strangers and permanent termination of a subsisting relationship with the child's father." *Id.*, at 146, 154 N. W. 2d, at 39.

'[T]he presumption here created is . . . definitely conclusive—incapable of being overcome by proof of the most positive character.'" *Id.*, at 96.

"All servicemen not residents of Texas before induction," we concluded, "come within the provision's sweep. Not one of them can ever vote in Texas, no matter" what their individual qualifications. *Ibid.* We found such a situation repugnant to the Equal Protection Clause.

Despite *Bell* and *Carrington*, it may be argued that unmarried fathers are so seldom fit that Illinois need not undergo the administrative inconvenience of inquiry in any case, including Stanley's. The establishment of prompt efficacious procedures to achieve legitimate state ends is a proper state interest worthy of cognizance in constitutional adjudication. But the Constitution recognizes higher values than speed and efficiency.[8] Indeed, one might fairly say of the Bill of Rights in general, and the Due Process Clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praiseworthy government officials no less, and perhaps more, than mediocre ones.

Procedure by presumption is always cheaper and easier

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[8] Cf. *Reed* v. *Reed*, 404 U. S. 71, 76 (1971). "Clearly the objective of reducing the workload on probate courts by eliminating one class of contests is not without some legitimacy. . . . [But to] give a mandatory preference to members of either sex over members of the other, merely to accomplish the elimination of hearings on the merits, is to make the very kind of arbitrary legislative choice forbidden by the Equal Protection Clause of the Fourteenth Amendment." *Carrington* v. *Rash*, 380 U. S. 89, 96 (1965), teaches the same lesson. ". . . States may not casually deprive a class of individuals of the vote because of some remote administrative benefit to the State. *Oyama* v. *California*, 332 U. S. 633. By forbidding a soldier ever to controvert the presumption of nonresidence, the Texas Constitution imposes an invidious discrimination in violation of the Fourteenth Amendment."

than individualized determination. But when, as here, the procedure forecloses the determinative issues of competence and care, when it explicitly disdains present realities in deference to past formalities, it needlessly risks running roughshod over the important interests of both parent and child. It therefore cannot stand.[9]

Bell v. *Burson* held that the State could not, while purporting to be concerned with fault in suspending a driver's license, deprive a citizen of his license without a hearing that would assess fault. Absent fault, the State's declared interest was so attenuated that administrative convenience was insufficient to excuse a hearing where evidence of fault could be considered. That drivers involved in accidents, as a statistical matter, might be very likely to have been wholly or partially at fault did not foreclose hearing and proof in specific cases before licenses were suspended.

We think the Due Process Clause mandates a similar result here. The State's interest in caring for Stanley's children is *de minimis* if Stanley is shown to be a fit

[9] We note in passing that the incremental cost of offering unwed fathers an opportunity for individualized hearings on fitness appears to be minimal. If unwed fathers, in the main, do not care about the disposition of their children, they will not appear to demand hearings. If they do care, under the scheme here held invalid, Illinois would admittedly at some later time have to afford them a properly focused hearing in a custody or adoption proceeding.

Extending opportunity for hearing to unwed fathers who desire and claim competence to care for their children creates no constitutional or procedural obstacle to foreclosing those unwed fathers who are not so inclined. The Illinois law governing procedure in juvenile cases, Ill. Rev. Stat., c. 37, § 704–1 *et seq.*, provides for personal service, notice by certified mail, or for notice by publication when personal or certified mail service cannot be had or when notice is directed to unknown respondents under the style of "All whom it may Concern." Unwed fathers who do not promptly respond cannot complain if their children are declared wards of the State. Those who do respond retain the burden of proving their fatherhood.

father. It insists on presuming rather than proving Stanley's unfitness solely because it is more convenient to presume than to prove. Under the Due Process Clause that advantage is insufficient to justify refusing a father a hearing when the issue at stake is the dismemberment of his family.

III

The State of Illinois assumes custody of the children of married parents, divorced parents, and unmarried mothers only after a hearing and proof of neglect. The children of unmarried fathers, however, are declared dependent children without a hearing on parental fitness and without proof of neglect. Stanley's claim in the state courts and here is that failure to afford him a hearing on his parental qualifications while extending it to other parents denied him equal protection of the laws. We have concluded that all Illinois parents are constitutionally entitled to a hearing on their fitness before their children are removed from their custody. It follows that denying such a hearing to Stanley and those like him while granting it to other Illinois parents is inescapably contrary to the Equal Protection Clause.[10]

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[10] Predicating a finding of constitutional invalidity under the Equal Protection Clause of the Fourteenth Amendment on the observation that a State has accorded bedrock procedural rights to some, but not to all similarly situated, is not contradictory to our holding in *Picard* v. *Connor*, 404 U. S. 270 (1971). In that case a due process, rather than an equal protection, claim was raised in the state courts. The federal courts were, in our opinion, barred from reversing the state conviction on grounds of contravention of the Equal Protection Clause when that clause had not been referred to for consideration by the state authorities. Here, in contrast, we dispose of the case on the constitutional premise raised below, reaching the result by a method of analysis readily available to the state court.

For the same reason the strictures of *Cardinale* v. *Louisiana*, 394 U. S. 437 (1969), and *Hall* v. *California*, 401 U. S. 797 (1971), have been fully observed.

The judgment of the Supreme Court of Illinois is reversed and the case is remanded to that court for proceedings not inconsistent with this opinion.

It is so ordered.

MR. JUSTICE POWELL and MR. JUSTICE REHNQUIST took no part in the consideration or decision of this case.

MR. JUSTICE DOUGLAS joins in Parts I and II of this opinion.

MR. CHIEF JUSTICE BURGER, with whom MR. JUSTICE BLACKMUN concurs, dissenting.

The only constitutional issue raised and decided in the courts of Illinois in this case was whether the Illinois statute that omits unwed fathers from the definition of "parents" violates the Equal Protection Clause. We granted certiorari to consider whether the Illinois Supreme Court properly resolved that equal protection issue when it unanimously upheld the statute against petitioner Stanley's attack.

No due process issue was raised in the state courts; and no due process issue was decided by any state court. As MR. JUSTICE DOUGLAS said for this Court in *State Farm Mutual Automobile Ins. Co.* v. *Duel*, 324 U. S. 154, 160 (1945), "Since the [state] Supreme Court did not pass on the question, we may not do so." We had occasion more recently to deal with this aspect of the jurisdictional limits placed upon this Court by 28 U. S. C. § 1257 when we decided *Hill* v. *California*, 401 U. S. 797 (1971). Having rejected the claim that *Chimel* v. *California*, 395 U. S. 752 (1969), should be retroactively applied to invalidate petitioner Hill's conviction on the ground that a search incident to arrest was overly extensive in scope, the Court noted Hill's additional contention that his personal diary, which was one of the items

of evidence seized in that search, should have been excluded on Fifth Amendment grounds as well. MR. JUSTICE WHITE, in his opinion for the Court, concluded that we lacked jurisdiction to consider the Fifth Amendment contention:

> "Counsel for [the petitioner] conceded at oral argument that the Fifth Amendment issue was not raised at trial. Nor was the issue raised, briefed, or argued in the California appellate courts. [Footnote omitted.] The petition for certiorari likewise ignored it. In this posture of the case, the question, although briefed and argued here, is not properly before us." 401 U. S., at 805.

In the case now before us, it simply does not suffice to say, as the Court in a footnote does say, that "we dispose of the case on the constitutional premise raised below, reaching the result by a method of analysis readily available to the state court." *Ante*, at 658 n. 10. The Court's method of analysis seems to ignore the strictures of JUSTICES DOUGLAS and WHITE, but the analysis is clear: the Court holds *sua sponte* that the Due Process Clause requires that Stanley, the unwed biological father, be accorded a hearing as to his fitness as a parent before his children are declared wards of the state court; the Court then reasons that since Illinois recognizes such rights to due process in married fathers, it is required by the Equal Protection Clause to give such protection to unmarried fathers. This "method of analysis" is, of course, no more or less than the use of the Equal Protection Clause as a shorthand condensation of the entire Constitution: a State may not deny *any* constitutional right to some of its citizens without violating the Equal Protection Clause through its failure to deny such rights to *all* of its citizens. The limits on this Court's jurisdiction are not properly expandable by the use of such semantic devices as that.

Not only does the Court today use dubious reasoning in dealing with limitations upon its jurisdiction, it proceeds as well to strike down the Illinois statute here involved by "answering" arguments that are nowhere to be found in the record or in the State's brief—or indeed in the oral argument. I have been unable, for example, to discover where or when the State has advanced any argument that "it is unnecessary to hold individualized hearings to determine whether particular fathers are in fact unfit parents before they are separated from their children." *Ante*, at 647. Nor can I discover where the State has "argu[ed] that Stanley and all other unmarried fathers can reasonably be presumed to be unqualified to raise their children." *Ante*, at 653. Or where anyone has even remotely suggested the "argu[ment] that unmarried fathers are so seldom fit that Illinois need not undergo the administrative inconvenience of inquiry in any case, including Stanley's." *Ante*, at 656. On the other hand, the arguments actually advanced by the State are largely ignored by the Court.[1]

[1] In reaching out to find a due process issue in this case, the Court seems to have misapprehended the entire thrust of the State's argument. When explaining at oral argument why Illinois does not recognise the unwed father, counsel for the State presented two basic justifications for the statutory definition of "parents" here at issue. See Tr. of Oral Arg. 25–26. First, counsel noted that in the case of a married couple to whom a legitimate child is born, the two biological parents have already "signified their willingness to work together" in caring for the child by entering into the marriage contract; it is manifestly reasonable, therefore, that both of them be recognised as legal parents with rights and responsibilities in connection with the child. There has been no legally cognizable signification of such willingness on the part of unwed parents, however, and "the male and female . . . may or may not be willing to work together towards the common end of child rearing." To provide legal recognition to both of them as "parents" would often be "to create two conflicting parties competing for legal control of the child."

The second basic justification urged upon us by counsel for the State was that, in order to provide for the child's welfare, "it is

All of those persons in Illinois who may have followed the progress of this case will, I expect, experience no little surprise at the Court's opinion handed down today. Stanley will undoubtedly be surprised to find that he has prevailed on an issue never advanced by him. The judges who dealt with this case in the state courts will be surprised to find their decisions overturned on a ground they never considered. And the legislators and other officials of the State of Illinois, as well as those attorneys of the State who are familiar with the statutory provisions here at issue, will be surprised to learn for the first time that the Illinois Juvenile Court Act establishes a presumption that unwed fathers are unfit. I must confess my own inability to find any such presumption in the Illinois Act. Furthermore, from the record of the proceedings in the Juvenile Court of Cook County in this case, I can only conclude that the judge of that court was unaware of any such presumption, for he clearly indicated that Stanley's asserted fatherhood of the children would stand him in good stead, rather than prejudice him, in any adoption or guardianship proceeding. In short, far from any inti-

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necessary to impose upon at least one of the parties legal responsibility for the welfare of [the child], and since necessarily the female is present at the birth of the child and identifiable as the mother," the State has selected the unwed mother, rather than the unwed father, as the biological parent with that legal responsibility.

It was suggested to counsel during an ensuing colloquy with the bench that identification seemed to present no insuperable problem in Stanley's case and that, although Stanley had expressed an interest in participating in the rearing of the children, "Illinois won't let him." Counsel replied that, on the contrary, "Illinois encourages him to do so if he will accept the legal responsibility for those children by a formal proceeding comparable to the marriage ceremony, in which he is evidencing through a judicial proceeding his desire to accept legal responsibility for the children." Stanley, however, "did not ask for custody. He did not ask for legal responsibility. He only objected to someone [else] having legal control over the children." Tr. of Oral Arg. 38, 39–40.

mations of hostility toward unwed fathers, that court gave Stanley "merit points" for his acknowledgment of paternity and his past assumption of at least marginal responsibility for the children.[2]

In regard to the only issue that I consider properly before the Court, I agree with the State's argument that the Equal Protection Clause is not violated when Illinois gives full recognition only to those father-child relationships that arise in the context of family units bound together by legal obligations arising from marriage or from adoption proceedings. Quite apart from the religious or quasi-religious connotations that marriage has—and has historically enjoyed—for a large proportion of this Nation's citizens, it is in law an essentially contractual relationship, the parties to which have legally enforceable rights and duties, with respect both to each other and to any children born to them. Stanley and the mother of these children never entered such a relationship. The record is silent as to whether they ever privately exchanged such promises as would have bound them in marriage under the common law. See *Cartwright* v. *McGown*, 121 Ill. 388, 398, 12 N. E. 737, 739 (1887). In

[2] The position that Stanley took at the dependency proceeding was not without ambiguity. Shortly after the mother's death, he placed the children in the care of Mr. and Mrs. Ness, who took the children into their home. The record is silent as to whether the Ness household was an approved foster home. Through Stanley's act, then, the Nesses were already the *actual* custodians of the children. At the dependency proceeding, he resisted only the court's designation of the Nesses as the legal custodians; he did not challenge their suitability for that role, nor did he seek for himself either that role or any other role that would have imposed legal responsibility upon him. Had he prevailed, of course, the *status quo* would have obtained: the Nesses would have continued to play the role of actual custodians until either they or Stanley acted to alter the informal arrangement, and there would still have been no living adult with any legally enforceable obligation for the care and support of the infant children.

any event, Illinois has not recognized common-law marriages since 1905. Ill. Rev. Stat., c. 89, § 4. Stanley did not seek the burdens when he could have freely assumed them.

Where there is a valid contract of marriage, the law of Illinois presumes that the husband is the father of any child born to the wife during the marriage; as the father, he has legally enforceable rights and duties with respect to that child. When a child is born to an unmarried woman, Illinois recognizes the readily identifiable mother, but makes no presumption as to the identity of the biological father. It does, however, provide two ways, one voluntary and one involuntary, in which that father may be identified. First, he may marry the mother and acknowledge the child as his own; this has the legal effect of legitimating the child and gaining for the father full recognition as a parent. Ill. Rev. Stat., c. 3, § 12–8. Second, a man may be found to be the biological father of the child pursuant to a paternity suit initiated by the mother; in this case, the child remains illegitimate, but the adjudicated father is made liable for the support of the child until the latter attains age 18 or is legally adopted by another. Ill. Rev. Stat., c. 106¾, § 52.

Stanley argued before the Supreme Court of Illinois that the definition of "parents," set out in Ill. Rev. Stat., c. 37, § 701–14, as including "the father and mother of a legitimate child, or the survivor of them, or the natural mother of an illegitimate child, [or] . . . any adoptive parent," [3] violates the Equal Protection Clause in that it

[3] The Court seems at times to ignore this statutory definition of "parents," even though it is precisely that definition itself whose constitutionality has been brought into issue by Stanley. In preparation for finding a purported similarity between this case and *Bell v. Burson*, 402 U. S. 535 (1971), the Court quotes the legislatively declared aims of the Juvenile Court Act to "strengthen the minor's family ties whenever possible, removing him from the custody of

treats unwed mothers and unwed fathers differently. Stanley then enlarged upon his equal protection argument when he brought the case here; he argued before this Court that Illinois is not permitted by the Equal Protection Clause to distinguish between unwed fathers and any of the other biological parents included in the statutory definition of legal "parents."

The Illinois Supreme Court correctly held that the State may constitutionally distinguish between unwed fathers and unwed mothers. Here, Illinois' different treatment of the two is part of that State's statutory scheme for protecting the welfare of illegitimate children. In almost all cases, the unwed mother is readily identifiable, generally from hospital records, and alternatively by physicians or others attending the child's birth. Unwed fathers, as a class, are not traditionally quite so easy to identify and locate. Many of them either deny all responsibility or exhibit no interest in the child or its welfare; and, of course, many unwed fathers are simply not aware of their parenthood.

Furthermore, I believe that a State is fully justified in concluding, on the basis of common human experience, that the biological role of the mother in carrying and nursing an infant creates stronger bonds between her and the child than the bonds resulting from the male's often casual encounter. This view is reinforced by the observable fact that most unwed mothers exhibit a concern for their offspring either permanently or at least until

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his parents only when his welfare or safety or the protection of the public cannot be adequately safeguarded without removal." (Emphasis added.) The Court then goes on to find a "self-contradiction" between that stated aim and the Act's non-recognition of unwed fathers. *Ante*, at 653. There is, of course, no such contradiction. The word "parent" in the statement of legislative purpose obviously has the meaning given to it by the definitional provision of the Act.

they are safely placed for adoption, while unwed fathers rarely burden either the mother or the child with their attentions or loyalties. Centuries of human experience buttress this view of the realities of human conditions and suggest that unwed mothers of illegitimate children are generally more dependable protectors of their children than are unwed fathers. While these, like most generalizations, are not without exceptions, they nevertheless provide a sufficient basis to sustain a statutory classification whose objective is not to penalize unwed parents but to further the welfare of illegitimate children in fulfillment of the State's obligations as *parens patriae*.[4]

Stanley depicts himself as a somewhat unusual unwed father, namely, as one who has always acknowledged and never doubted his fatherhood of these children. He alleges that he loved, cared for, and supported these children from the time of their birth until the death of their mother. He contends that he consequently must be treated the same as a married father of legitimate children. Even assuming the truth of Stanley's allegations, I am unable to construe the Equal Protection Clause as requiring Illinois to tailor its statutory definition of "parents" so meticulously as to include such unusual unwed fathers, while at the same time excluding those unwed, and generally unidentified, biological fathers who in no way share Stanley's professed desires.

[4] When the marriage between the parents of a legitimate child is dissolved by divorce or separation, the State, of course, normally awards custody of the child to one parent or the other. This is considered necessary for the child's welfare, since the parents are no longer legally bound together. The unmarried parents of an illegitimate child are likewise not legally bound together. Thus, even if Illinois did recognize the parenthood of both the mother and father of an illegitimate child, it would, for consistency with its practice in divorce proceedings, be called upon to award custody to one or the other of them, at least once it had by some means ascertained the identity of the father.

Indeed, the nature of Stanley's own desires is less than absolutely clear from the record in this case. Shortly after the death of the mother, Stanley turned these two children over to the care of a Mr. and Mrs. Ness; he took no action to gain recognition of himself as a father, through adoption, or as a legal custodian, through a guardianship proceeding. Eventually it came to the attention of the State that there was no living adult who had any legally enforceable obligation for the care and support of the children; it was only then that the dependency proceeding here under review took place and that Stanley made himself known to the juvenile court in connection with these two children.[5] Even then, however, Stanley did not ask to be charged with the legal responsibility for the children. He asked only that such legal responsibility be given to no one else. He seemed, in particular, to be concerned with the loss of the welfare payments he would suffer as a result of the designation of others as guardians of the children.

Not only, then, do I see no ground for holding that Illinois' statutory definition of "parents" on its face violates the Equal Protection Clause; I see no ground for holding that any constitutional right of Stanley has been denied in the application of that statutory definition in the case at bar.

As Mr. Justice Frankfurter once observed, "Invalidating legislation is serious business . . . ." *Morey* v. *Doud*, 354 U. S. 457, 474 (1957) (dissenting opinion). The

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[5] As the majority notes, *ante*, at 646, Joan Stanley gave birth to three children during the 18 years Peter Stanley was living "intermittently" with her. At oral argument, we were told by Stanley's counsel that the oldest of these three children had previously been declared a ward of the court pursuant to a neglect proceeding that was "proven against" Stanley at a time, apparently, when the juvenile court officials were under the erroneous impression that Peter and Joan Stanley had been married. Tr. of Oral Arg. 19.

Court today pursues that serious business by expanding its legitimate jurisdiction beyond what I read in 28 U. S. C. § 1257 as the permissible limits contemplated by Congress. In doing so, it invalidates a provision of critical importance to Illinois' carefully drawn statutory system governing family relationships and the welfare of the minor children of the State. And in so invalidating that provision, it ascribes to that statutory system a presumption that is simply not there and embarks on a novel concept of the natural law for unwed fathers that could well have strange boundaries as yet undiscernible.